*** THE HON'BLE THE ACTING CHIEF JUSTICE SRI BILAL NAZKI**

THE HON'BLE SRI JUSTICE SRI JUSTICE GODA RAGHURAM

THE HON'BLE SRI JUSTICE V.V.S.RAO

THE HON'BLE SRI JUSTICE N.V.RAMANA

And

THE HON'BLE SRI JUSTICE R. SUBHASH REDDY

+ Writ Petitions Nos. 13832, 13894, 14276, 14290, 14293, 14338, 14387, 14388, 14396, 14485, 14507, 14541, 14819, 14936, 14959, 15009 AND 15812 of 2005

% , OF SEPTEMBER,
TWO THOUSAND FOUR

Kum B. Archana Reddy, D/o B. Narayana Reddy,
R/o H.No.2-2-25/P/4/A, D.D.Colony, Bagh Amberpet,
Hyderabad and Others

Petitioners

Versus

$ State of A.P., rep. by its Secretary, Law (Legislative Affairs & Justice) Department, Secretariat, Hyderabad, and Others.

Respondents

! Counsel for the petitioners :

1. T.Suryakaran Reddy
2. B.Mahindra Reddy, represented by K.Ramakrishna Reddy
3. L.Ravi Chander
4. K.Sita Ram
5. D.Radhiv Reddy, represented by D.Prakash Reddy

^ Counsel for the respondents :

1. S.Ramachandra Rao—Asaduddin Owasi, Lal Jan Basha , Muslim United Front, Muslim Reservation Porata Samithi
2. Advocate General

(Counsel for Interveners:)

3. S.S.Prasad--- Bezawada Muslim Lawyers Welfare Association
4. E.Ayyapa Reddy—Muslim Minorities Welfare Association
5. Noushad Ali—Decccan Youth Association
6. K.G.K.Prasad--- Akbaruddin Owasi
7. K.Ramakantha Reddy, Akbar Ali Khan
8. K.Balagopal--- Habeebur Rahaman, Mahaboob Alam Khan

9. S.Niranjan Reddy,-- Syed Anwar Basha, Sultan- Ul- Uloom Educational society
10. M.A.Ashfq Mohiuddin – The Kul Hind Sunni Zamitatul Masaiq
11. Ch.Satish Kumar—Muzaid Khan
12. C.V.Nagarjuna Reddy—Ibrahim Khalwelulah Trust
13. Ghulam Yezdan ---
14. Basit Ali Yavar --

< Gist :

>Head Note:

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? CITATIONS:

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(2) 2004 (6) ALD 1 (LB)
(3) AIR 1963 SC 649
(4) 1992 Supp (3) SCC 217
(5) (2000) 1 SCC 168.

(GRJ CITATIONS)
? Citations:
1) 2004 (5) ALT 634
2) 1992 Supp. III SCC 217
3) AIR 1951 SC 229
4) AIR 1951 SC 226
5) (1972) 1 SCC 660
6) AIR 1963 SC 649
7) AIR 1968 SC 1012
8) AIR 1969 SC 1
9) (1972) 1 SCC 660
10) (1971) 1 SCC 38
11) (1995) Supp. SCC 714
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13) 266 US 507 (1925)
14) (1973) 1 SCC 420
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THE HON'BLE SRI BILAL NAZKI, THE ACTING CHIEF JUSTICE
THE HON'BLE SRI JUSTICE GODA RAGHURAM
THE HON'BLE SRI JUSTICE V.V.S.RAO
THE HON'BLE SRI JUSTICE N.V.RAMANA
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THE HON'BLE SRI JUSTICE R.SUBHASH REDDY

WRIT PETITION Nos.

13832, 13894, 14276, 14290, 14293, 14338, 14387, 14485, 14388, 14396, 14507, 14541, 14819, 14936, 14959, 15009 and 15812 of 2005

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% 07-11-2005

Between:

Kum.B.Archana Reddy, rep.by father and natural Guardian,B.Narayana Reddy, R/o.Bagh Amberpet, Hyderabad & Others.

..... PETITIONERS

AND

The State of A.P., rep.by its Secretary to Govt., Law (Legislative Affairs and Justice)

Department, Secretariat Buildings, Hyderabad & Others.

.....RESPONDENTS

THE HON'BLE SRI BILAL NAZKI, THE ACTING CHIEF JUSTICE
THE HON'BLE SRI JUSTICE GODA RAGHURAM
THE HON'BLE SRI JUSTICE V.V.S.RAO
THE HON'BLE SRI JUSTICE N.V.RAMANA
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THE HON'BLE SRI JUSTICE R.SUBHASH REDDY

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13832, 13894, 14276, 14290, 14293, 14338, 14387, 14485, 14388, 14396, 14507, 14541, 14819, 14936, 14959, 15009 and 15812 of 2005

COMMON JUDGMENT : (Per Hon'ble Sri Bilal Nazki, ACJ for himself & on behalf of Hon'ble Sri R.Subhash Reddy, J)

I have the privilege of going through the elaborate opinions framed by my brother Judges Mr.Justice Goda Raghuram and Mr.Justice V.V.S.Rao. By and large, I am in agreement with them, but there are some areas, where I could not pursue myself to go along with the opinion of my brothers, though the fate of the cases would be the same and the writ petitions would have to be allowed. Facts have been mentioned in detail by my learned brothers in their judgments, but in order to frame my opinion, certain facts would have to be repeated.

Andhra Pradesh Reservation of seats in the Educational Institutions and of appointments/posts in the Public Services under the State to Muslim Community

Ordinance, 2005 (Ordinance No.13 of 2005, dated 20.06.2005), is under challenge in these writ petitions. A battery of lawyers assisted us in these writ petitions. There are writ petitioners, respondents and the interveners. Mainly, there were following questions, which fell for our consideration;

(1) Whether Muslims, as a community, can be declared socially and educationally backward for the purposes of Articles 15 and 16 of the Constitution ?

(2) Whether there was relevant and scientific material before the Commission to come to a conclusion that Muslims in Andhra Pradesh were, as a Community, backward socially and educationally ?

(3) How far the Court could go into analyzing the material which was collected by the Commission ?

(4) Whether the criteria adopted by the Commission was right and if the Court could go into the relevance of the criteria ?

My reservations are with regard to 1st question itself, as to whether Muslims, as a community, could be declared socially and educationally backward. The facts which are relevant for the purpose of this question are;

On 25th of August, 1994, the Government of Andhra Pradesh issued G.O.Ms.No.30 Backward Classes Welfare (P.II) Department, ordering Muslims, Kapus, Balijas and Telagas to be treated as socially and educationally backward classes of citizens for the purpose of reservation of seats in educational institutions and for recruitment to jobs in Government and local bodies. In this G.O., the Government took note of the fact that Government of A.P. had constituted a Commission under Act 20 of 1993 and while the Commission was examining the representations received from various communities for inclusion in the list of backward classes, there had been considerable unrest among the members of various Castes and Communities on the question that they were not being declared as backward classes. The Government made a request to the Commission for an interim report. But the Commission did not submit a report and expressed its inability to do so. The Government noted the demand and was of the view that this was a long pending demand with mass support. This G.O. was challenged in ***A.P.State Backward Classes Welfare Association v. State of Andhra Pradesh, Backward Classes Welfare Department***[1]***.*** This Court interpreted the G.O. and found that it was not a final decision for providing reservations for those communities. After this judgment, it appears that the Government took out meeting of various Secretaries on 2nd of June, 2004. On 4th

of June, 2004, Government issued G.O.Ms.No.50, entrusting the work, "relating to the study of socio-economic and educational conditions of Muslim community in the State to the Commissionerate of Minorities Welfare, headed by the Ex-officio Commissioner to examine the social, economic and educational backwardness of Muslim Community in the State for the purpose of including them within the purview of the Backward Classes of citizens under Articles 15(4) and 16(4) of the Constitution and present its report to the Government at an early date". The Commissionerate of Minorities Welfare submitted its report to the Government on 5th of July, 2004. It recommended 5% reservation to Muslim minorities in employment, education and other fields on par with the Backward Classes in the State. The Government accepted the recommendations and issued an order vide G.O.Ms.No.33, dated 12.07.2004, directing that Muslims in the State be provided with 5% reservations in educational institutions and employment in the State. This was over and above the reservations provided to the backward classes under an earlier G.O. A new category i.e. Category-E was added to the A, B, C, D categories. This G.O. was challenged by way of a writ petition being ***T.Muralidhar Rao v. State of A.P. and others***[2]. The G.O. was struck down by a five-Judge Bench of this Court. One of the grounds on which this G.O. was quashed by the Court, was that the matter had not been referred to Backward Classes Commission. The Judges of the Larger Bench wrote three different opinions. Mr.Justice B.Sudershan Reddy in para 251, gave three directions to the State Government after quashing G.O.Ms.No.33. They are;

> "1. The Government of Andhra Pradesh shall forthwith initiate the process of reconstituting the Andhra Pradesh Commission for Backward Classes and complete the same within a period of three months. That immediately upon such reconstitution, the Government shall initiate the process of consultation and seek the opinion of the Commission for inclusion of the Muslim Community into the list of Backward Classes.
>
> 2. The Commission shall examine the requisition/request of the Government and shall decide the same by duly giving its opinion within a period of six months from the date of such requisition/request being made by the State Government. It shall be open to the State Government to forward the entire material in its possession, including the material collected by the Commissionerate of Minorities Welfare for the perusal and consideration of the Backward Classes Commission.
>
> 3. The identification of any caste, social group or community involves exclusion of creamy layer. The State of Andhra Pradesh though a party to the decision rendered by the Supreme Court in ***Indra Sawhney***'s case [1992 Supp (3) SCC 217], so far did not lay down any criteria for identification of creamy layer.

In the circumstances, it would be just and necessary to direct the State Government to lay down the criteria for identification of creamy layer so that it could be applied while considering the case of the Muslim Community for identification as backward class. That an appropriate criteria shall be evolved by the Government in terms of the directions of the Supreme Court in ***Indra Sawhney'***s case. The very process of identification of Backward Classes involves identification of creamy layer amongst them. The criteria in this regard shall be laid down by the State Government within a period of three months or in the alternative to follow the criteria laid down by the Government of India in its Memorandum dated 08.09.1993 which has received its affirmation in ***Ahok Kumar Thakur v. State of Biha***r [AIR 1996 SC 75] and ***Indra Sawhney's Case-II*** [2000 (1) ALD 54 (SC)], in order to facilitate the expeditious disposal of the claim of the Muslim Community for their identification as a Backward Class."

Mr.Justice J.Chelameswar in para 62, held;

"62. Another submission is made by the State that the requirement to consult the Commission arises only when there is a general revision of the list, but not in the case of a proposal to include a new group of backward class of citizens to the existing list. This argument is required to be rejected for more than one reason. The expression "revision" according to the New Oxford Dictionary means reconsider and alter, re-examine and make alterations to. It has its root in the latin expression "revisery" meaning "look at again". It therefore need not necessarily mean in the context of Section 11 that a revision is with reference to all the entries in the existing list. Even an examination of the part of the list with reference to some existing classes is also a revision and so would be an addition of one or two new classes of the existing list. In fact, the last clause of Section 11(1) makes the same abundantly clear. To give any other meaning to the expression "revision" such as the one as suggested by the State would, in my view, simply defeat the purpose of the mandate of consultation embedded in Section 11(2). The State in order to avoid the consultation with the Commission may never undertake the revision of the entire list at one time and resort to a piecemeal examination from time to time. Such a construction which would defeat the logical purpose behind the mandate and therefore is required to be avoided. Apart from that it was positively directed by the Supreme Court that whenever the State proposes to include a new group/class, the matter must be referred to Backward Classes Commission in the first instance and action taken on the basis of its recommendation. Therefore, this submission is liable to be rejected."

Mr.Justice Ghulam Mohammed, who wrote the third opinion, held in para 67;

> "67. In the circumstances, the impugned G.O., passed by the Government is unsustainable on the grounds of non-consultation with the Backward Classes Commission as per provisions of Section 11(2) of the A.P. Act 20 of 1993, and the dicta laid down by the Supreme Court in ***Indra Sawhney***'s case. However, it is made clear that there is no impediment for the State Government to grant reservations to the Muslim Community, supported by sufficient material fulfilling the subjective satisfaction of the State, at this stage also, in accordance with law."

After this judgment was pronounced, Government issued G.O.Ms.No.57 on 18.11.2004 while exercising powers conferred by Section 3 of the Andhra Pradesh Commission for Backward Classes Act, 1993 (Act 20 of 1993). The Commission was to be headed by a Former Judge of this Court with four other members. Commissioner, B.C. Welfare is the Member Secretary of the Commission. The terms of reference were given in para 2 of the G.O. and it reads;

> "2. The Commission shall:-
>
> (i) Examine requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of over-inclusion or under-inclusion of any Backward Class in such list and tender such advice to the Government as it deems appropriate;
>
> (ii) Examine and make recommendations on any other matter relating to the backward classes that may be referred to it by the Government from time to time."

On 25.11.2004, Government wrote a letter to the Member Secretary of the A.P.Commission for Backward Classes, Hyderabad. It gave a reference to the judgment in ***Muralidhar Rao***'s case and quoted directions given by the Court, which have been referred to hereinabove, and thereafter, wrote to the Commission,

> "*In view of the above directions, I am to inform you that, Government after careful examination of the issue, decided to seek the opinion of the Commission under section 9(1) of the A.P.Commission for Backward Classes Act, 1993 (Act 20 of 1993), whether to include Muslim community within the purview of Backward Classes of citizens under Articles 15(4) and 16(4) of the Constitution. I am, therefore, to communicate the following material and request you to furnish the advice of the Commission to the Government, as it deem appropriate at the earliest."*

Thereafter, the Commission took upon the task of examining whether Muslims, as a community, could be declared Backward Class citizens under Articles 15(4) and 16(4) of the Constitution. It gave a report to the Government and on the basis of that report, the impugned Ordinance was issued.

The facts have been narrated in order to appreciate the controversy with regard to the 1st question, as to whether the Muslims can, as a community, be declared socially and educationally backward for the purposes of Articles 15(4) and 16(4) of the Constitution and in my view, this question was decided and it fell for consideration directly before the five-Judge Bench in ***Muralidhar Rao***'s case. It was not even seriously contended at the Bar by the battery of lawyers appearing for the petitioners that the judgment of the five-Judge Bench in ***Muralidhar Rao***'s case needs a reconsideration.

Now, let us examine what was the question before the five-Judge Bench and what were the answers given by it. As noted hereinabove, there were three different opinions, and in my view, in all the three opinions, this question was raised, considered and answered. Mr.Justice B.Sudershan Reddy framed question 1(b) in para 93 of the judgment as under;

> "1(b) Whether the Muslims as a group are entitled to affirmative action/social reservations within the constitutional dispensation ?"

It was answered in para 111 as under;

> "111. Reservations for Muslims or sections/groups among them, in no manner militate against secularism, which is a part of the basic structure of the constitution. The concept of secularism is based on a benign neutrality to benefit all including religious groups and it seeks to advance "good" for all including religious groups. Articles 14, 15 and 16 enjoin upon the State to treat all its people equally irrespective of their religion, faith or belief. The State while discharging its constitutional obligation cannot make any distinction between one group of citizens and other on the ground of religion, faith or belief. The religion, faith or belief of a person or group of persons is totally immaterial so far as the State action is concerned. The State cannot exclude from its consideration the demands, entitlements of any constitutional claimants on the ground of religion, faith or belief. Whether a group, caste or class is entitled to the benefit of affirmative action does not depend upon religion, faith or worship."

In para 251 again, Mr.Justice B.Sudershan Reddy, while asking the Government to initiate the process of reconstituting the Andhra Pradesh Commission for Backward Classes, asked the Government to initiate the process of consultation and seek the opinion of the Commission for inclusion of the Muslim community into the list of Backward Classes.

Mr.Justice J.Chelameswar, in paragraphs 28 and 32 of his opinion, held;

> "28. The fact that Muslims or for that matter Christians and Sikhs etc., are not excluded for the purpose of conferring the benefits

under Articles 15(4) or 16(4) was recognized at the earliest by the Supreme Court in ***M.R.Balaji v. State of Mysore*** [AIR 1963 SC 649]. Though the question was not directly in issue, the possibility of these groups of people being treated as Backward Class of citizens for the purpose of Articles 15 and 16 was not ruled out in the following words:

> "Besides, if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, the test would inevitably break down in relation to many sections of Indian society which do not recognize castes in the conventional sense known to Hindu society. *How is one going to decide whether Muslims, Christians or Jains or even Lingayats are socially backward or not ? The test of castes would be inapplicable to those groups, but that would hardly justify the exclusion of these groups in toto from the operation of Article 15(4)*. It is not unlikely that in some States some Muslims or Christians or Jains forming groups may be socially backward. That is why we think that though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or class of citizens, it cannot be made the sole or the dominant test in that behalf. Social backwardness is on the ultimate analysis the result of poverty, to a very large extent. It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens.""

"32. For the same reason, I do not find any legal infirmity in identifying a group or section of people by their profession or calling or the religion they follow. The next step is to examine whether such a class in its entirety answers the description of a backward class of citizens within the meaning of the Articles 15(4) or 16(4). The initial step of identifying a section of the society on the basis of the religion they follow is only an identification of a class of citizens, but not identification of a backward class of citizens. In my view, such an exercise is perfectly justified and within the parameters of the law laid down by the Supreme Court in this regard. Therefore, the submission is required to be rejected."

Mr. Justice Ghulam Mohammed, in his opinion, held in para 54;

"54. The Apex Court thus observed that the authority may take up the Muslim Community, after excluding those sections, castes and groups, if any, who have already been considered, and find

out whether it can be characterized as a backward class in the State. Identifying a section of society on the basis of the religion they follow is only an identification of class of citizens. Considering the circumstances, I am of the view that such an exercise is justified and there is no impediment to hold that Muslims are entitled to the affirmative action and I am fortified by the observations and the view taken by the Supreme Court in ***Indra Sawhney*** case. The issue is answered accordingly."

The question was decided by this Court in ***Muralidhar Rao***'s case after elaborate reasoning and after taking into consideration the judgments of the Supreme Court in ***M.R.Balaji & others v. The State of Mysore & others***[3]. In para 22 of the judgment, the Supreme Court held that it is necessary to bear in mind that the special provision is contemplated for classes of citizens and not for individual citizens as such, and so, though the caste of the group of citizens may be relevant, its importance should not be exaggerated. It further held that if the classification of backward classes of citizens is based solely on the basis of caste, it may not always be logical and it may even perpetuate the caste system itself. The test for determining the backward classes solely based on caste system was not approved by this judgment, as the Court was of the view that this test would inevitably break down in relation to the Sections of the society, which do not recognize caste system and it made a specific reference to Muslims, Christians and Jains or even Lingayats. In para 23, it held;

"23. Besides, if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, that test would inevitably break down in relation to many sections of Indian society which do not recognize castes in the conventional sense known to Hindu society. How is one going to decide whether Muslims, Christians or Jains, or even Lingayats are socially backward or not ? The test of castes would be inapplicable to those groups, but that would hardly justify the exclusion of these groups in toto from the operation of Art.15(4). It is not unlikely that in some States some Muslims or Christians or Jains forming groups may be socially backward. That is why we think that though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or the dominant test in that behalf. Social backwardness is on the ultimate analysis the result of poverty to a very large extent. The classes of citizens who are deplorably poor automatically become socially backward. They do not enjoy a status in society and have, therefore, to be content to take a backward seat. It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only

> shows the relevance of both caste and poverty in determining the backwardness of citizens."

Then again, even in ***Indra Sawhney & others v. Union of India & others***[4], which has now become the Bible on the law concerning reservations, Mr. Justice B.P.Jeevan Reddy (as His Lordship then was), after noting down that the identification of the backward classes was a complex task, but at the same time, noting down the importance of getting the backward classes of citizens of our society into the main stream by positive reservations in their favour, posed questions in para 780 of the judgment and the questions were—"(1) How do you go about identification ? (2) Where do you begin ?". He also noted that the method could be different from State to State, region to region and from rural to urban. Then, very important question that was framed for an answer was, "As to what do you do in the case of religions where caste-system is not prevailing ?" This was the question posed by Mr. Justice Gajendra Gadkar in ***Balaji***'s case also. The Court was conscious of what it was deciding and was also conscious of the fact that answer to this question would be relevant and material in future. Therefore, whatever was stated in para 780 of the judgment in ***Indra Sawhney***'s case was not a passing reference. But since the Court was giving its due importance to the caste system for the purpose of identification of the backward classes, it was also conscious that if the backwardness of a class of society is made dependant merely on the caste, then a vast number of people in this country would not get the benefits under Articles 15(4) and 16(4), because, those communities do not recognize the caste system. Mr. Justice Jeevan Reddy, however, added a note of caution as well in the following terms, after posing the questions. He said;

> "And so on and so forth are the many questions asked of us. We shall answer them. But our answers will necessarily deal with generalities of the situation and not with problems or issues of a peripheral nature which are peculiar to a particular State, district or region. Each and every situation cannot be visualized and answered. That must be left to the appropriate authorities appointed to identify. We can lay down only general guidelines".

In para 781, specifically the Supreme Court kept aside the Scheduled Tribes and Scheduled Castes from the discussion, as according to the Court, they were admittedly within the backward classes. In para 782, the Court tried to lay down the methodology for identification of backward classes and held that the ultimate idea was to survey the entire populace and frame an opinion that caste, occupation, poverty and social backwardness were closely interwired in the society. But, then again, added a caveat;

> "this does not mean that one can wind up the process of identification with the castes. Besides castes (whether found among Hindus or others) there may be other communities, groups, classes and denominations, which may qualify as backward class of citizens. For example, in a particular State, Muslim community as a whole may be found socially backward. (As a matter of fact, they are so treated in the State of Karnataka as well as in the State of Kerala by their respective State Governments). Similarly, certain sections and denominations among Christians in Kerala, who were included among backward communities notified in the former princely State of Travancore as far back as in 1935 may also be surveyed and so on and so forth. Any authority entrusted with the task of identifying backward classes may well start with the castes. It can take caste 'A', apply the criteria of backwardness evolved by it to that caste and determine whether it qualifies as a backwardclass or not. If it does qualify, what emerges is a backward class, for the purposes of clause (4) of Article 16. The concept of 'caste' in this behalf is not confined to castes among Hindus. It extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice. Having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes. For example, it may take up the Muslim community (after excluding those sections, castes and groups, if any, who have already been considered) and find out whether it can be characterized as a backward class in that State or region, as the case may be. The approach may differ from State to State since the conditions in each State may differ. Nay, even within a State, conditions may differ from region to region. Similarly, Christians may also be considered. If in a given place, like Kerala, there are several denominations, sections or divisions, each of these groups may separately be considered. In this manner, all the classes among the populace will be covered and that is the central idea. The effect should be to consider all the available groups, sections and classes of society in whichever order one proceeds. Since caste represents an existing, identifiable, social group spread over an overwhelming majority of the country's population, we say one may well begin with castes, if one so chooses, and then go to other groups, sections and classes. We may say, at this stage, that we broadly commend the approach and methodology adopted by the Justice O.Chinnappa Reddy Commission in this respect."

So, the import of the judgment of the Supreme Court as quoted above, is that Muslim community can be taken up as a class, to find out whether it can be characterized as a backward class in the State or region, as the case may be. Therefore, in view of these judgments, and in view of the fact that the five-Judge Bench of this Court has already categorically decided that Muslims can be declared as a community to be a backward class, I cannot agree with the views of my brother Judges Mr. Justice Goda Raghuram and Mr. Justice V.V.S.Rao.

Now, coming to the other questions, I do not have any quarrel with the opinions of Mr. Justice Goda Raghuram and Mr. Justice V.V.S.Rao. But I would add my views with regard to the report of the Commission, which in my view, could have not been accepted to frame an opinion that the Muslim community as a whole, in the State of Andhra Pradesh, is a backward community. We have gone through all the Commissions, which were appointed in this State and elsewhere. Mr. Justice Dalava Subrahmanyam Commission is the first Commission, which was appointed and which was not asked to identify the backward communities, but which was specifically asked whether the Muslim community in the State of Andhra Pradesh, was socially and educationally backward and this reference had been made on the basis of a judgment of this Court in ***Muralidhar Rao***'s case. The approach of the Commission, in my view, should have been altogether different from the approach adopted by the earlier Commissions, including the Mandal Commission. The Commission, on the other hand, proceeded like other Commissions, which were asked to identify groups of people, who could be declared backward. In Chapter-VI of the report, one of the questions framed by the Commission was, "What shall be the criteria for including any class of citizens as backward class." Then referred to the various judgments of the Apex Court and this Court. In pages 32 to 35, it summed up its discussion as under;

> "To sum up, the following are the general broad principles indicated by the High Court and Supreme Court for ascertaining social and educational backwardness.
>
> (1) The backwardness must be both social and educational. It is not either social or educational.
>
> (2) Classes of citizens cannot be equated to castes of citizens. For ascertaining whether a particular citizen or a group of citizens belong to backward classes or not, his or their caste may have some relevance, but it cannot be either sole or dominant criterion for ascertaining the classes to which he or they belong. If in a given situation, caste is excluded in ascertaining a class within the meaning of Article 15(4) of the Constitution, it does not vitiate the classification, if it satisfies the other tests. If, on the other hand, the castes as a whole are socially and educationally backward, the list prepared on this basis though caste-wide, it is not violative of Article 15 (vide Supreme Court judgment in Writ Petition, 1964, of Madras Government).
>
> (3) "The contention that only that group or section of people, who are suffering the lingering effects of past discrimination, can alone be designated as a backward class and not others, is unacceptable for more than one reason."
>
> (4) "The Muslims as a group are entitled to affirmative

action/social reservations within the Constitutional dispensation, provided they are identified as socially and educationally backward class for the purposes of Article 15(4) and backward class of citizens under Article 16(4). Providing social reservations to the Muslim community or sections or groups amongst them in no manner militate against secularism which is a part of basic structure of the Constitution."

(5) Social backwardness, is, on the ultimate analysis the result of poverty to a very large extent. Hence it may be relevant to take both caste and poverty in determining the backwardness of citizens.

(6) Occupations which are treated as inferior according to conventional beliefs and classes of citizens who follow these occupations are apt to become socially backward.

(7) Places of habitation also play not a minor part in determining the backwardness of a community of persons.

(8) The problem of determining a particular socially backward class is no doubt very complex. Sociological, social and economic considerations come into play in solving the problem and involving a proper criteria for determining which classes are socially backward, is obviously a very difficult task.

(9) In determining educational backwardness of a class of citizens the literacy tests supplied by the Census Reports may not be adequate. Having regard to the fact that the test is intended to determine which are educationally backward classes, it may not be necessary or proper to put this test as high as has been done by the Naganna Gowd Committee, that is, the average of student population in the last three high school classes. It is only the communities, which are well below the State average that can properly be regarded as educationally backward classes of citizens. Classes of citizens whose average of student population works below 50 per cent of the State average are obviously educationally backward classes of citizens. On this point, the Supreme Court has expressed that it is not proposed to lay down any hard and fast rule and it is for the State to consider the matter and decide it in a manner which is consistent with the requirements of Article 15(4).

(10) "Indeed there is no such thing as a standard or model procedure/approach. It is for the authority (appointed to identify) to adopt such approach and procedure as it thinks appropriate, and so long as the approach adopted by it is fair and adequate, the Court has no say in the matter."

(11) "And there is no rule of law that a test to be applied for identifying backward classes should be only one and/or uniform."

(12) Reservation exceeding 50 percent can be made to meet extraordinary circumstances."

In Chapter-VII, after discussing the criteria adopted by various earlier Commissions like Anantharaman Commission, Kumara Pillai Commission, Mandal Commission and Muralidhar Rao Commission, it laid down its own criteria at page 43 as 'Questions' and sub-divided it into social, educational, employment, economic, political and general categories. It also noted at page 51;

> "This Commission felt that the social criterion of early marriage by Mandal commission may not be very objective because it is more to do with social customs than backwardness. The custom of sati and child marriage are commonly prevalent among the Rajputs of Rajasthan but this is by no means because of their social backwardness."

In page 52, it further noted;

> "Similarly certain educational and social criteria adopted by the Mandal commission require individual survey because of non availability of this data through any governmental census. It is not possible to conduct this individual census by this Commission on any reasonable sample scale in the time frame mandated by the High Court. It is not practicable for this Commission to undertake this type of census in any extended time frame also in view of the constraints of its resources and administrative machinery."

At page 53, it adopted the criteria after long discussion as under;

"1. The general poverty of the class as a whole;
2. Engagement in one of the following occupation:-
   (a) Cultivator
   (b) Artisan
   (c) Petty businessmen
   (d) Class IV in government services and corresponding class or service in private employment.
   (e) Any other occupation involving manual labour.
3. Living in slum and unhygienic habitations
4. Quantum of political representation in elected bodies.
5. Education; and
6. Employment."

Coming to this criterion first, it would perhaps be reasonable to have such a criterion if the Commission had to identify backward groups. But in the present case, group was already identified and the Commission had to say whether that group could be declared socially and educationally backward. This criterion has nothing, which is peculiar to Muslims as a community. The poverty of a class of people in any community or religion, engagement in the occupation as Cultivator, Artisan, Petty businessman, Class IV in Government service and corresponding

class in private employment or occupation involving manual labour, could be a criterion for identifying people as socially and educationally backward across the society. No community, religious or otherwise, in the country, is there, which do not have such classes of people. Similarly, living in slum and unhygienic habitations and quantum of political representation in elected bodies could not be sole indicator for declaring the Muslims as a community socially and educationally backward. Therefore, in my view, the criteria itself for a declaration that Muslims were socially backward, was defective, unscientific, unreasonable and absurd. The Commission also had its difficulties while analyzing the educational backwardness of Muslims. In page 56, it is stated;

> "The Commission requested the school education department to furnish the particulars of the total number of students enrolled in all the classes at the primary and secondary level and the number of Muslim students out of them. It was informed by the school education department that they have no separate data about the Muslim students. Hence it was decided to request the Commissioner, B.C.Welfare Department to get this data collected on random basis covering the entire State. Accordingly the Commissioner, B.C.Welfare Department asked the ABCWOs. to collect the enrolment particulars of at least three schools in different Mandals in their respective jurisdictions. Accordingly 100 ABCWOs. collected data from 540 schools in 300 Mandals out of 1124 Mandals in the State. Sample covering twenty five percent Mandals spread over all the twenty three districts in the whole State is a quite extensive coverage and the Commission felt that it is adequately representative and reliable data."

While taking the sample of school education, the percentage of Muslim students from Class 1 to Class 5 was 9.45 and the gap in Muslim representation in the schools was nil. Therefore, in my view, the criteria, which was adopted, was similar to the criteria that had been adopted by the earlier Commissions while they were asked to identify the backward groups, whereas in the present case, the reference was whether the Muslims in Andhra Pradesh State were socially and educationally backward, and if such a reference has to be answered by a Commission, the criteria, in my view, had to be materially different than the criteria adopted by Mr. Justice Subrahmanyam Commission and earlier Commissions, because, the indicators which were fixed as criteria by the Commission, could be used as indicators for identifying groups from any other religion as well. It is not for this Court to suggest what should have been the indicators, but at the same time, I am tempted to say that if it has to be examined whether Muslims, as a community, are backward socially and educationally, the indicators should be such, which are peculiar to this community alone. For instance, it is not a secret that men in this community have unfettered powers of divorcing their wives and

what could be the effect of such a power of husbands on the social and educational backwardness of the community. Similarly, it is not a secret that a large majority of Muslim women observe *Parda*. Whether that is responsible for educational backwardness of the women of this community, as to what was the percentage of the educated women of Muslim community and what was the percentage of the educational level of general population of this country. According to latest Census, the birth rate amongst Muslims is higher than the national average. This Court does not suggest that in future exercises, these indicators should be used as parameters. It was only intended to give an example that when a community as a whole, which is identifiable by its religion, is considered for grant of benefits of positive discrimination, the mode of identification should altogether be different from what has been in the past, where groups of people were identified whether they belong to 'A' religion or 'B' religion. Even in the present reservation order, which is in existence, certain groups of Muslim community like Dudekula, Laddaf, Pinjari/Noorbash and Mehtar are already declared socially and educationally backward. All fishermen are in backward class, whether he is a Muslim or a Hindu or a Christian. Therefore, the criteria adopted earlier, had no difficulty, because it was being applied across the board. Now, if a religious community has to be declared a backward community, some indicators, specific to that community, as a whole, in addition to other accepted indicators, would have to be adopted. Otherwise, it would be a reservation purely on the basis of religion. The exercise has been done just mechanically, by following the criteria laid down in some earlier Commissions prior to the present Commission, which had altogether a different task. Therefore, this report should have not been relied upon. On this aspect, I draw support from a judgment of the Supreme Court in ***Indra Sawhney v. Union of India & others***[5]**.** In para 9, the Court held;

> "9. Inclusion of castes in the list of backward classes cannot be mechanical and cannot be done without adequate relevant data. Nor can it be done for extraneous reasons. Care should be taken that the forward castes do not get included in the backward castes' list. In *Indra Sawhney*[1] Pandian, J. observed (SCC p. 408, para 174) that before a conclusion is drawn that a caste is backward or is inadequately represented in the services,
>
> > "the existence of circumstances relevant to the formation of opinions is a sine qua non. If the opinion suffers from the vice of non-application of mind or formulation of collateral grounds or beyond the scope of statute, or irrelevant and extraneous material, then that opinion is challengeable".
>
> Sawant, J. (see para 539 of SCC) too pointed out the need for proper application of mind to the facts and circumstances, the field, the post

> and the extent of existing representation and the need to balance representation. On behalf of himself and three others, Jeevan Reddy, J. pointed out (para 798 SCC) that opinion in regard to backwardness and inadequate representation must be based on relevant material. The scope of judicial scrutiny even with regard to matters relating to subjective satisfaction are governed by the principles stated in *Barium Chemicals Ltd.* v. *Company Law Board*[2]. Likewise, periodic examination of a backward class could lead to its exclusion if it ceases to be socially backward or if it is adequately represented in the services. Once backward, always backward is not acceptable. In any case, the "creamy layer" has no place in the reservation system.

I don't propose to deal with other questions as they have been elaborately discussed by my brother Judges Mr. Justice Goda Raghuram and Mr.Justice V.V.S.Rao, and I agree with their conclusions. Since the identification is done on a defective criteria, which is unscientific, which does not at all indicate as to whether the Muslim community, as a whole, is backward or not, the Ordinance has to go.

For these reasons, I allow these writ petitions and quash the impugned Ordinance.

COMMON ORDER ::

(Per the Hon'ble Sri Justice Goda Raghuram)

Our carefully organized constitutional system of a secular democracy is imperiled by the impugned religion-explicit scheme of reservations in educational institutions and public employment, chorus the petitioners. The formal institutions designed by humankind are as viable as the maturity of its adherents. We need say no more. We proceed to answer only those issues that have an adjudicative disposition.

I have perused the judgment prepared by my learned brother Hon'ble Mr. Justice V.V.S.Rao, a meticulous and detailed analysis of the issues presented and falling for consideration. I concur with the conclusions that *The Andhra Pradesh Reservation of Seats in the Educational Institutions and of Appointments or Posts in the Public Services under the State to Muslim Community Ordinance, 2005* (**the Ordinance**), must perish. I am also in agreement with the conclusions: that relevant criteria for identifying the social backwardness were not formulated by the Andhra Pradesh Commission for Backward Classes (headed by Justice Subrahmanyam) (**the Commission**); the conclusion that the Commission's declaration that the Muslim community is socially backward is based on identification and application of irrelevant criteria applied to grossly inadequate

data; that the entirety of the State exercise in this area commencing from the reference to the Commission, the report of the Commission and the provisions of the Ordinance being facially religion specific, strict and vigorous judicial scrutiny standards should be applied to ensure that the State action is constitutionally benign and I concur with the conclusion that the reservation being in excess of 50% is unsustainable.

The issues presented in this case are of vital significance to the civil society and our constitutional order. I therefore consider it desirable and obligatory to add my distinct opinion on some aspects and issues, despite my concurrence, as recorded above, with the opinion of Hon'ble Mr. Justice Rao.

In the several writ petitions the validity of the Andhra Pradesh Ordinance No. 13 of 2005 – "the Andhra Pradesh Reservation of Seats in Educational Institutions and of Appointments or Posts in Public Service under the State to Muslim Community Ordinance 2005" (**the Ordinance**) notified in the AP Gazette No.30, dated 21.6.2005, is under challenge.

A brief history of the immediate events leading to the Ordinance :-

A) A broad overview of the post-independent endeavors of the Federal and of the Andhra Pradesh Executive to identify backwardness and some of the litigations that have ensued thereby has been chronicled in the judgment by a Larger Bench of this Court in ***T. Muralidhar and others v State of A.P. and others ([6])*** (for short '***Muralidhar*** ').

B) The State Government issued G.O. Ms. No. 33, dated 12.7.2004 directing provision of 5% reservation for Muslims in the State in educational institutions and public employment, over and above the reservations provided to backward classes and treating them as backward class under Category-E. The Government Order directed all departments of the Government to make necessary amendments to the rules and other instruments, in that regard.

C) The validity of G.O.Ms.No.33 was canvassed on several grounds. The Larger Bench recorded three opinions – the lead judgment by B.Sudershan Reddy,J, for himself, A. Gopal Reddy and K.C.Bhanu, JJ; with J.Chelameswar and Ghulam Mohammed, JJ, recording concurrence on the core conclusion and a broad affirmance on the other conclusions and findings.

D) In ***Muralidhar*** this court declared G.O.Ms.No.33 invalid principally on the ground that the Andhra Pradesh Commission for Backward Classes Act 1993 ('the 1993 Act') mandates consultation by the State Government with

the Commission constituted under the 1993 Act and that the G.O. having been issued without such consideration, is *ultra vires* the 1993 Act. The findings recorded in the lead opinion are set out in paragraph 249 of the ALT report, as below:

"249. The following are our conclusions and answers to the questions dealt with hereinabove:

1(a). The expression "socially and educationally backward classes" in Article 15(4) and the expression "backward class of citizens" in Article 16(4) may include any caste, community or social group which may be identified as socially backward. That a caste is also a class of citizens and if such caste as a whole in its entirety is socially and educationally backward, provisions can be made in favour of such caste on the basis that it has socially and educationally backward class of citizens within the meaning of Article 15(4). The same can be treated as a backward class within the meaning of Article 16(4). Social backwardness may be found in other groups, classes and sections among the populace apart from the caste.

1(b). The Muslims as a group are entitled to affirmative action/social reservations within the Constitutional dispensation, provided they are identified as socially and educationally backward class for the purposes of Article 15(4) and backward class of citizens under Article 16(4). Providing social reservations to the Muslim community or sections or groups amongst them in no manner militate against secularism, which is a part of basic structure of the Constitution.

2) The problem of determining who are socially backward classes is a very complex one. The caste which is a social class if found educationally and socially backward for the purposes of Article 15(4), it would be socially and educationally backward class. Similarly, if it is backward socially, it would be a backward class for the purposes of Article 16(4).

The backward classes can be identified on the basis of a caste which is a social class in India provided it is identified to be socially and educationally backward for the purposes of Article 15(4) and backward for the purposes of Article 16(4). There are no legal or Constitutional impediments for identification of the backward classes with reference to caste. However, the requirement is that a rational and scientific criteria must be evolved for determining backwardness and that criteria must be applied to find out whether any caste, occupational groups, classes or sections of people qualify for classifying them as backward classes. If the criteria evolved and applied for identification of the backward classes is found to be improper and invalid, then the classification of socially backward classes based on that criteria will have to be held to be inconsistent with the requirements of Articles 15(4) and 16(4).

In case of non-hindus social backwardness cannot be identified for the purposes of recognising as socially backward class on the basis of caste in the conventional sense known to hindu society. In all such cases, the part played by the occupation, conventional belief and place of habitation coupled with poverty may play a dominant and significant role in determining social backwardness. No particular procedure or method of identification of backward classes is prescribed. The authority appointed to identify the backward classes is free to adopt such method/procedure as it thinks fit and proper and so long, the method/procedure adopted for the purposes of identification of the backward classes is rational, scientific, fair and adequate, the same may satisfy the Constitutional requirement. But in either case, identification of backward classes cannot be based exclusively and solely on the basis of caste.

3) The process of identification of Muslims as a group as socially backward by the Commissionerate of Minorities Welfare is totally vitiated since it did not determine any specific criteria for the purposes of identifying the backward classes and applied the same in order to find out as to whether the Muslims qualify to categorise them as socially backward and as well as backward for the purposes of Articles 15(4) and 16(4). The Commissionerate acted in undue haste. The Commissionerate failed to undertake any serious investigation and enquiry as is required before identifying the Muslim community as a socially backward class. In the absence of laying down the criteria for ascertaining the backwardness, the entire report is to be treated as an exercise in futility. The approach adopted by the authority is improper and invalid. In the absence of any such finding as to the social backwardness, the Muslims cannot be classified as backward classes either for the purposes of Article 15(4) or Article 16(4) of the Constitution of India.

4) That Section 11(2) of Act 20 of 1993 is mandatory in its nature. The State Government is bound to consult the A.P Backward Classes Commission before undertaking any revision of the backward classes list. The expression "revision" includes inclusion or addition of any new class into the list of backward classes. In the absence of such consultation, the State Government in issuing the impugned G.O acted in contravention of the mandatory provision of law. The G.O is, therefore, ultra vires.

5) The creamy layer is required to be excluded in the course of identification of backward classes. Non-exclusion of creamy layer has the same effect of inclusion of forward caste/groups in the list of backward classes. The creamy layer among the Muslim community are not entitled to the benefit of social reservations. The impugned G.O which does not make any provision to exclude the creamy layer from the benefit of social reservations is violative of Articles 14 and 15(1) and 16(1) and also of Articles 15(4) and 16(4) of the Constitution of India.

6) The reservations contemplated in Clause (4) of Article 15 and as well as Clause (4) in Article 16 should not exceed 50% unless to meet extraordinary situations. No case as such is made out in justification of exceeding 50% reservations.

7) The State did not make out that reservations in favour of Muslims were made under Articles 15(1) and 16(1) of the Constitution of India. The plea that reservations can be made in favour of minorities under Articles 15(1) and 16(1) of the Constitution is untenable and unsustainable as the same would amount to making reservations on the basis of religion which is prohibited by Articles 15(1) and 16(2) of the Constitution of India.

8) The determination of backwardness and the process of identification is not a subjective exercise nor a matter of subjective satisfaction. The exercise is an objective one. The authority entrusted with the task of identification is required to evolve objective, social, sociological and other considerations and apply the same before any group or class of citizens could be treated as backward. That if the body entrusted with the task of identification or for that matter, the Executive includes, for collateral reasons any group or class not specifying the relevant criteria as a backward class, it would be a clear case of fraud on power. The decision is liable to be tested on the touchstone of arbitrariness, irrationality and as well as on the grounds of non-application of mind or perversity or on the ground that it was formed on collateral grounds. The norms and parameters for adjudging the validity of administrative action are applicable for testing the validity of exercise of power

and in particular, the action taken under Articles 15(4) and 16(4) so far as the identification of backward classes is concerned; the yardstick is same and not different.

However, formation of opinion regarding adequacy of representation in the services of the State is within the subjective satisfaction of the Government. The State is entitled to form its opinion on the basis of the material it has in its possession already or it may gather such material from a Commission/Committee, person or authority, but even that opinion formed is not beyond the judicial scrutiny altogether. In the absence of existence of the circumstances and the material relevant to the formation of opinion for drawing requisite satisfaction, the decision is challengeable; the judicial scrutiny would be available on the ground of non-application of mind or formulation of collateral grounds. If the formation of opinion is found to be mala fide or is found to be based wholly on extraneous and/or irrelevant grounds, it is liable to be set aside.

The words of Article 16(4) are not simplicitor, "in the opinion of the State" "is not adequately represented" in the services under the State, the State may make provision for the reservation of appointments or posts in favour of backward class of citizens. It is a conditional power and the same can be exercised provided the requisite factual situation which is a condition precedent to the exercise of power exists. Whether condition precedent to the formation of the opinion have a factual basis can always be examined by the Court. However, the sufficiency of the material, reasonableness and propriety cannot be gone into by this Court.

E) ***Muralidhar*** struck down G.O. Ms. No. 33 declaring it violative of Articles 14, 15(1) and (4) and 16(2) and (4) of the Constitution of India and directed the State Government *inter alia* to forthwith initiate the process of reconstituting the Commission, initiate the process of consultation with it and seek the Commission's opinion for inclusion of Muslim community in the list of Backward Classes. With regard to creamy layer aspect, ***Muralidhar*** directed:

"251. The following directions are given to the Government of Andhra Pradesh :
… … …

(3) The identification of any caste, social group or community involves exclusion of creamy layer. The State of Andhra Pradesh though a party to the decision rendered by the Supreme Court in ***Indra Sawhney's case*** *(AIR 1993 SC 477), so far did not lay down any criteria for identification of creamy layer. In the circumstances, it would be just and necessary to direct the State Government to lay down the criteria for identification of creamy layer so that it could be applied while considering the case of the Muslim Community for identification as backward class. That an appropriate criteria shall be evolved by the Government in terms of the directions of the Supreme Court in* ***Indra Sawhney's case*** *(supra). The very process of identification of backward classes involves identification of creamy layer amongst them. The criteria in this regard shall be laid down by the State Government within a period of three months or in the alternative to follow the criteria laid down by the Government of India in its Memorandum dated 8.9.1993 which has received its affirmation in* ***Ashok Kumar Thakur vs. State of Bihar (****AIR 1996 SC 75****)*** *and* ***Indra Sawhney's case****-II [(2000) 1 SCC 168], in order to facilitate the expeditious*

disposal of the claim of the Muslim Community for their identification as a backward class."

F) Pursuant to the ***Muralidhar*** decision the State Government *qua* G.O.Ms.No. 57 dated 18.11.2004 constituted the Commission. The Commission submitted its recommendations to the Government by its report-dated 14.6.2005. On the basis of the report, the Ordinance was issued.

G) The Ordinance reads as under:

ANDHRA PRADESH ORDINANCE NO.13 OF 2005

Promulgated by the Governor in the fifty-sixth Year of the Republic of India.

An Ordinance to provide Reservation to Muslim Community in the matters of Admission into Educational Institutions and Appointments to Public Services in the State of Andhra Pradesh and for matters connected therewith or incidental thereto.

Whereas, the Government provided 5% reservation to Muslims in the State in educational institutions and employment in the state vide GO Ms.No.33, Backward Classes Welfare Department dt.12.7.2004.

And whereas, the above orders were challenged in the Andhra Pradesh High Court.

And whereas, Larger Bench of the Andhra Pradesh High Court in its judgment in WP No.12239/2004 etc., dt.21.9.2004 held that the above orders are ultra vires *inter alia* on the ground that the State Government is bound to consult the Andhra Pradesh Backward Classes Commission before undertaking any revision of the Backward Classes List and they do not reflect formation of opinion as to adequacy of representation of Muslim Community in the service of the State and directed the Government to reconstitute the Andhra Pradesh Commission for Backward Classes to examine the matter;

And whereas, the Hon'ble High Court of Andhra Pradesh observed that the Muslims as a group are entitled to affirmative action/social reservations within the Constitutional dispensation, provided they are identified as a socially and educationally backward class for the purpose of Article 15(4) and Backward Class of citizens for the purpose of Article 16(4) of the Constitution of India and providing social reservation to the Muslim Community or selections or groups among them in no manner militate against secularism which is a part of the basic structure of the Constitution;

And whereas, the High Court held that the creamy layer among the Muslim community are not entitled to the benefits of social reservation;

And whereas the Andhra Pradesh Commission for Backward Classes found that the entire Muslim Community is socially, educationally and economically backward and therefore steps shall be taken for providing reservation to the members of the Muslim Community for improving their social, educational and economic conditions;

And whereas, the said commission held that Muslims are not adequately represented in State employment;

And whereas, the Commission further recommended that provision be made for providing 5% reservation to Muslim Community in all educational institutions and public services in the State.

And whereas, the existing reservation provided to the Scheduled Castes and Scheduled Tribes and Backward classes is at 46%.

And whereas, the Supreme Court in Indra Sawhney Vs. Union of India in WP (C) No.97/1991 dated 16.11.1992 held that reservation under clause (4) of Article 16 of the Constitution of India shall not exceed 50% of the appointments or posts barring certain extraordinary situations;

And whereas, the commission also considered that the percentage of population of Scheduled Castes, Scheduled Tribes and Backward Classes in the state is exceeding 68% of the total population and the Muslim population in the State of Andhra Pradesh is 9.2% of total population and further having regard to the fact that the existing Backward Classes have not attained the levels of advancement warranting a revision of existing reservations and felt that in the extraordinary situation prevalent in the State providing total reservations of 51% may be considered by the Government.

And whereas, the Backward Classes Commission also recommended that the creamy layer from among the Muslim community would however have to be excluded from the benefits of recommended reservation by adopting the criteria laid down by the Government of India.

And whereas Article 46 of the Constitution of India provides that the State shall promote with special care the educational and economic interest of the weaker sections of the people;

And whereas, the Backward Classes population in the State comes to more than 77% of total population and therefore, a further reservation of 5% in favour of Muslim community in addition to existing 46% of social reservation is considered to be just and reasonable;

And whereas, the State Government accepted the recommendations of the Andhra Pradesh Commission for Backward Classes to provide 5% reservation to the Muslim Community for admission into the seats in educational institutions in the State and employment in the public services in the State of Andhra Pradesh and to exclude the creamy layer from the benefit of reservation;

And whereas, the Legislative Assembly of the State is not now in session and the Governor of Andhra Pradesh is satisfied that

circumstances exist which render it necessary for him to take immediate action.

Now, therefore, in exercise of the powers conferred by clause (1) of Article 213 of the Constitution of India, the Governor hereby promulgates the following **Ordinance**…

1. (1) This Ordinance may be called the Andhra Pradesh Reservation of seats in the Educational Institutions and of appointments or posts in the Public Services under the State to Muslim Community Ordinance, 2005.

(2) It extends to the whole of the State of Andhra Pradesh.

(3) It shall come into force at once.

2. In this Ordinance unless the context otherwise requires-

(a) "Educational Institutions" means a college, a school imparting education upto and inclusive of tenth class or other institution by whatever name called, whether managed by Government, private body, local authority or university and carrying on the activity of imparting education therein, whether technical, professional including medical or otherwise, and includes a Polytechnic, Industrial Training Institute and Teachers' Training Institute.

(b) "Government" means State Government of Andhra Pradesh.

(c) "Muslims" means any person professing the faith of Islam but does not include for the purpose of this Ordinance, persons belonging to Dudekula, Laddaf, Pinjari/Noorbash and Mehtar groups who are already included in the lists of Backward Classes in the State.

(d) "Notification" means a notification published in Andhra Pradesh Gazette and the word "Notified" shall be construed accordingly.

(e) "Public Service" means public service as defined in Andhra Pradesh (Regulation of Appointments to Public Services and Rationalization of Staff Pattern and Pay Structure) Act, 1994.

3. Having regard to the social, educational and economic backwardness, the members of the Muslim community residing in the State are hereby declared as Backward Classes and be included in the lists of Backward Classes prepared by the Government from time to time.

4. Notwithstanding anything in any other law for the time being in force, there shall be reservation of five percent of seats for admission into educational institutions in favour of Muslims residing in the State.

Provided that the members belonging to the creamy layer amongst Muslim community shall not be entitled to such reservation.

5. Notwithstanding anything in any other law for the time being in force, there shall be reservation of five percent in

appointments or posts in Public Services under the State in favour of Muslims residing in the State.

Provided that the members belonging to the creamy layer among Muslim community shall not be entitled to such reservation.

<u>Explanation:</u> For the purpose of this Ordinance the creamy layer shall be such as may be determined by the State Government and till such determination takes place, the guidelines issued by the Government of India from time to time shall be followed.

6. The Government, may, by notification make provision for carrying out all or any of the purposes of this Ordinance.

7. If any difficulty arises in giving effect to the provisions of this Ordinance, the Government may make such order not inconsistent with the provisions of the Ordinance as may appear to them to be necessary or expedient for the purpose of removing such difficulty.

Provided that no such orders shall be issued after expiry of two years from the date of commencement of this Ordinance.

The judgment of Hon'ble Mr. Justice V.V.S.Rao, has elaborately dealt with several of the issues presented for consideration in this case. I do not therefore propose to deal with all the issues. I have recorded the aspects on which I concur with the conclusions on specific issues covered in the said judgment. On some of the issues covered in the said judgment, where I have a distinct point of view to record, I do so herein and on some issues, which were argued but not covered in the said judgment too.

The **issues** on which I record my opinion are:

(a) Whether the declaration of members of the Muslim community residing in the State of A.P as Backward Classes and their inclusion in the list of Backward Classes is illegal and unsustainable in the light of the law declared by the Supreme Court in ***Indra Sawhney and others Vs. Union of India and Others*** ([7]) (for short "**Mandal**") and in violation of Articles 14,15 and 16 of the Constitution of India?

(b) Whether identification of the entire Muslim community and its declaration as a Backward Class is the product of woefully inadequate data; irrelevant and arbitrary criteria, unrelated and contrary to the constitutional discipline and the substantive requirements of Articles 14,15 and 16 of Constitution of India, irrational and arbitrary analysis and ***ipse dixit*** conclusions recorded by the Commission?

(c) (i) Whether the failure of the Commission, to recognize the Muslim collective in the State as a heterogeneous social class; the failure to exclude those insular classes of Muslims already recognized and established as Backward Classes while computing the population of the Muslims community; the failure to collect data on social, educational and economic aspects in relation to only the remnant population of the Muslim collective; the failure to formulate criteria of social backwardness, to identify the existence of any of further classes/groups in the remnant Muslim population (in the context of insular classes of social backwardness) and the failure to apply such relevant evolved criteria to the appropriate data and to reach rational conclusions, renders the exercise by the Commission and its consequent conclusions and recommendations irrational, perverse and invalid?; and (ii) Whether the provisions of the Ordinance based exclusively on an invalid and unsustainable report of the Commission, are invalid?

(d) (i) Whether in view of the definition of the expression "**Muslims**" (Section 2(c) of the Ordinance), the State legislative exercise *qua* the Ordinance is a fraud on the Constitution? and

(ii) Whether the categorization of "**Muslims**" as Backward Classes is in substance and operation clearly and exclusively a religion specific Governmental reservations programme and the label of Backward Classes is only a camouflage to shield a clearly unconstitutional State action? and

(e) Whether the Ordinance is invalid for having facilitated reservations in excess of established Constitutional limits?

Most modern human collectives organized as Nation States with organized governance systems under a Constitutional order, have evolved from minimalist governance mechanisms to dynamic and affirmative State participation and intervention. Equality and equal opportunity to its citizens is in most cases a tacit or positive function of a modern State. Integral to the evolution of the modern State into an affirmative State has been the phenomenon of positive State action to achieve a realistic and functional measure of equality. Constitutional instruments enact explicit power to Governments in this area. The Indian Constitution is illustrative of such a constitutional instrument. The Chapters on Fundamental Rights and Directive Principles, together with the interpretive gloss placed on the provisions of these chapters by our courts, exemplify the positive and dynamic role

that is permitted to the State to affirmatively govern to achieve *inter alia,* equality before the law and the equal protection of the laws.

The founding fathers were conscious that conferment of undefined powers even on elected Governments and in a system where the administrative authority is answerable to legislatures (under the Parliamentary system of democracy), is not an adequate check on abuse. In drafting our Organic Instrument it also appears to have been recognized that the very context and reality of our plural society, with diverse religions, languages, cultures, races and other demographic insularities comprising the Indian civil society, conferral of un-annotated power on the Legislature or the Executive, may not ensure the impairment of a just and equal constitutional order, a value underscored by Articles 14 to 16 of the Constitution. To contain the imperilment of the unity and integrity of the Nation and to ensure the equilibrium of our plural society, every class and category of power and authority conferred on every State instrument/agency, is in the ultimate analysis a defined and limited power and authority, be the limitation explicit or inherent and implied. The several decisions of our Supreme Court [including in **Kesavananda Bharati Sripadagalavaru v State of Kerala** (1973) 4 SCC 225 – (***Kesavananda***)**; and S. R. Bommai v Union of India** (1994) 3 SCC 1 – (***Bommai***)] illustrate the coherence of the constitutional scheme of limited authority of all constitutional instrumentalities including in the exercise of constituent power (of constitutional amendment) or even the inherently political power (of dissolution of legislatures in exercise of political discretion).

The Constitution declares: ***India, that is Bharat, shall be a Union of States. [Art.1(1)].*** *Inter alia*, prohibition of religion, race, caste, sex and descent specific classifications in State action [Art. 15(2), 16(2)] reemphasize that India is not conceived to be a Union of religions, races, castes, genders or descents. In our considered view this is a basic and transcendent value that runs through the text and seam of our Constitution. Every State action including affirmative action State programmes must conform to this essential, transcendent and inalienable constitutional value.

How then is this delicate balance achieved between the constitutional limits and the affirmative action agendas of Government?

Eradicating religion, race, caste, sex, descent, place of birth or residence specific discriminations, overcoming the malingering effects of such distinctions, achieving a true measure of pluralism and diversity without sectoral domination and creating an inclusive civil society moving towards the preambuler goals of Justice, Liberty, Equality and Fraternity, are the mandate of our Constitution. This

mandate finds utterance in the several Articles and the value permeates the scheme and texture of our organic document.

Where a caste, race, descent, place of birth or residence specific choice is the facial basis of any State action, a critical examination and an intense scrutiny is warranted by the judicial branch, before which the issue is presented. The examination is to verify and ensure compliance by the State of the critical constitutional value of prohibition of caste or religion specific State action, conferring favors or imposing burdens. While caste or religion may permissibly be a starting point for identifying a class of citizens for social and educational backwardness determination, when social and educational backwardness (for Art.15) and social backwardness plus inadequate representation in public services (for Art.16) are not discernable, the initial label or grouping (on caste and religion basis), is the demonstrable object and goal of the State and runs foul of the Constitution's prohibitions (spelt out in Art.15 (1) and 16 (2) and inhering in Art.14).

The *raison d'etre* of conferral of the power of review of Legislative and Executive exercises, on the judicial branch appears to be the recognition by the Constitution that neither political diversity, societal plurality, the inherent checks and balances ensured by the democratic political processes, the structural mechanisms for limiting State powers -vertical and horizontal, *per se* ensure voluntary behaviour by the State with the Constitution's commands. Thus it is that the Charter of the Republic thought it likely that Governments' affirmative obligation to the Constitution's mandate is ensured by some measure of intervention from an institution (the Judiciary) insulated from the pressures of majoritarian politics.

Does the impugned Ordinance constitute a legitimate, constitutionally permissible affirmative action programme or is it an overtly malign, religion specific preference, falling within the expressed prohibitions of Art. 15(1) and 16(2) is the substantive question that falls for determination in this case. The Constitution prohibits in the clearest terms, religion specific governmental programmes even of affirmative action. This constitutional command is deducible from the clear language of Articles 15(1) and 16(2); Articles 26 – 30 and is a compelling implication of Art.14.

The clear signal of Articles 14 to 16 is that, *inter alia* religion is withdrawn from the incorrigible temptations of governmental use. Religion specific conferral of benefits or imposition of burdens, offend the Constitution. Governmental temptations, even those widely shared across an expanse of the spectrum (political or executive), have a transient life susceptible to fast paced and radical

change over time and circumstance but the core values of the Constitution remain relatively immutable, transcendent and immune to passing fancy of populist policy impulses, sometimes driven by nothing more substantial than competitive political compulsions.

If affirmative action in favour of Muslims as Muslims [without a redeeming, sound and rational showing that Muslims *en bloc* constitute a backward class within the meaning of Art. 15(4) and 16(4)] passes constitutional muster, a Governmental programme in favour of Hindus as Hindus should *a fortiori* be constitutionally benign. The implications of receiving such a doctrine as a constitutional verity, has ominous implications - given the vast disparities in the population of the several religious denominations that enrich the texture of the Indian Civil Society and the heady and overpowering influence that our insularities normally have on political processes and Governmental action. Religion specific State action is ever a hem-lock, it cannot be ambrosia when administered in favour of a religious minority.

Quotas even for affirmative action, predicated on religion basis alone, derogate the human dignity of all to whom they are applied, positively or negatively. They are invidious in practice and in principle. Religious and caste specific quotas divide the society, accentuate prejudices and retard a civil society which is exhorted by the Constitution to strive for an equality that makes religion and caste irrelevant.

Our Constitution consecrates to the Legislatures and the Executive branches a broad spectrum of choices in social engineering, including by affirmative action programmes, to achieve a just and equal society, by guaranteeing equality before the law and equal protection of the laws. There however are clear and value pregnant boundaries to the wide but not limitless policy choices of the State. The limits are reached when State action transgresses the prohibitions implicit in Art.14 and explicit in Arts.15 (1) and 16(2). In affirmative action programmes that are facially caste or religion specific, the State action, to survive constitutional challenge, must establish its roots in the permissible area of State action (under Art. 15(4) and 16(4) of the Constitution).

Relevant criteria, adequate and probative data must exist to sustain a conclusion of backwardness of a class (social and/or educational). On the adequacy of data that justifies the satisfaction as to backwardness, the State is consecrated wide but not absolute discretion. State conclusions based on illusory or irrelevant information or data would justify and compel a judicial determination that the State's conclusion (as to backwardness) is a camouflage to shield

constitutionally forbidden caste, race or religion specific classifications – *a fraud on power*.

The State must, in the context of an affirmative action programme for public employment benefits, satisfy that there is a manifest imbalance (inadequate representation) of a particular class of citizens and that the imbalance is the product of specific social backwardness. Such satisfaction must be based on objective analyses of probative and adequate data, relevant to discernable criteria bearing a rational nexus to the constitutionally permitted schemata of pursuing affirmative State programmes.

Every affirmative action programme must be supported by a valid classification having a rational nexus with the constitutional object of ameliorative and positive State action to achieve the maximum degree of qualitative and relative equality by redressing backwardness, without transgressing the constitutional limits explicated in Art. 15(1) and 16(2).

The above are the broad principles that are deducible from the wealth of available precedents, on the scope and contours of Arts. 14 to 16 of the Constitution. ***Mandal*** has made a painstaking, meticulous and almost exhaustive analyses of the several decisions relevant to various issues that arise in relation to reservations by the State under the Constitution.

In the context of the issues presented and considered therein, ***Muralidhar*** has summarized the relevant principles of ***Mandal.*** To a large extent therefore a detailed analysis of the several precedents on many of the issues arising in this case, is avoided. We avoid the avoidable exercise of a parade of familiar learning, reminding ourselves that in curial opinion as in religion the holiness of the proceedings must not be equated with the length and repetitiveness of the ritual.

What are the essential criteria which legitimate and justify the identification and categorization of a group of citizens from the social collectivity of a State as a "Backward Class" and for the purpose of extending to such a class, affirmative benefits in particular in the form of quotas or reservations in education and public employment is a crucial and inescapable inquiry in this case.

Whether caste specific identification of Backward Classes for extending affirmative action programmes by the State offends the constitutional scheme has been a regnant aspect of judicial enquiry, debate and analysis since the early dawn of our

Repubic. From **State of Madras Vs. Smt. Champakam Dorairajan (**[8]***)*** and ***B.Venkataramana Vs. State of Madras (***[9]***)*** **(Champakam Dorairajan & Venkataramana**) to ***Indra Sawhney and others Vs. Union of India and Others*** (**Mandal**)**,** the landscape of affirmative action discourse in the Indian context has primarily involved the issue whether a caste is equivalent to or synonymous with a class and whether caste specific identification and recognition as a Backward Class passes constitutional muster.

Religion specific identification and categorization of backward classes has

not directly fallen for consideration and critical judicial scrutiny in any judgment of our Supreme Court (none has been brought to our notice). In the context of analysis of the provisions of the Constitution, Articles 14 to 16 in particular, the Supreme Court is however seen to have made observations as to whether groups within a religious collective or even a religion as a whole could be considered for identification and categorization as Backward Class.

Issues (a) and (c):

(a) Whether the declaration of members of the Muslim community residing in the State of A.P as Backward Classes and their inclusion in the list of Backward Classes is illegal and unsustainable in the light of the law declared by the Supreme Court in ***Indra Sawhney and others Vs. Union of India and Others*** (***Mandal***) and in violation of Articles 14,15 and 16 of the Constitution of India?

(c) (i) Whether the failure of the Commission, to recognize the Muslim collective in the State as a heterogeneous social class; the failure to exclude those insular classes of Muslims already recognized and established as Backward Classes while computing the population of the Muslims community; the failure to collect data on social, educational and economic aspects in relation to only the remnant population of the Muslim collective; the failure to formulate criteria of social backwardness, to identify the existence of any of further classes/groups in the remnant Muslim population (in the context of insular classes of social backwardness) and the failure to apply such relevant evolved criteria to the appropriate data and to reach rational conclusions, renders the exercise by the Commission and its consequent conclusions and recommendations irrational, perverse and invalid?; and

(ii) Whether the provisions of the Ordinance based exclusively on an invalid and unsustainable report of the Commission, are invalid?

What is backwardness in the context of Arts. 15(4) and 16(4) ?

Pandian, J (***Mandal*** para-82) summarized his analysis of the relevance and significance of caste as a criterion for identification of socially and educationally backwardness:

> "*Unless 'caste' satisfies the primary test of social backwardness as well as the educational and economic backwardness which are the established accepted criteria to identify the backward class, a caste per se without satisfying the agreed formulae generally cannot fall within the meaning of 'backward class of citizens under Art.16 (4), save in given exceptional circumstances such as the caste itself being identifiable with the traditional occupation of the lower strata – indicating the social backwardness*".

With regard to non-Hindu communities such as Muslims and Christians, the learned Judge pointed out that though the caste system is not recognized and permitted, in practice however these communities have not been completely immune to this malaise; though Islam professes common brotherhood, there are several distinctions in one form or another amongst various sections of the Muslim community especially amongst the converts to Islam. There are occupational

groups as well such as Pinjare, Dudekula and the like. "*Thus even among non-Hindus, there are occupational organizations or social groups or sects which are having background/evolution.* ***They too constitute social collectivities and form separate classes for the purposes of Article 16(4).***"(***Mandal-*** paras 84 to 87, 92 and 95).(**emphasis is ours**)

Pandian,J also held that though the caste factor does not furnish a reliable yardstick to identify social and backward groups in non-Hindu collectives, yet on the principle of the other agreed criteria such as traditional occupation, trade, place of residence, poverty, lack of education or economic backwardness etc., the social and economic backwardness of these communities could be identified independent of caste criteria. (***Mandal*** para-99) He further held:

> *"* ***… the primary consideration*** *in identifying a class and in ascertaining the inadequate representation of that class in the services under the State under Article 16(4)* ***is the social backwardness which results in educational backwardness, both of which culminate in economic backwardness. The degree of importance to be attached to social backwardness is much more than the importance to be given to the educational backwardness and the economic backwardness****, because in identifying and classifying a section of people as a backward class within the meaning of Articles 16(4) for the reservation of appointments or posts, the 'social backwardness' plays a predominant role."* (***Mandal*** para-117)(**emphasis is ours**)

Pandian,J also opined that for designation as backward class, it is not necessary that the group of citizens should be similarly situated as Scheduled Castes and Scheduled Tribes. (***Mandal*** - para-126).

Sawant,J held: No classification can validly be made only on the basis of caste just as it cannot be made only on the basis of religion, race, sex, descent, place of birth or any of them. A class of citizens is backward [in the context of Art.16 (4)] if it is socially and therefore educationally and economically backward. Any factor – whether caste, race, religion, occupation, habitation etc., which may have been responsible for the social and educational backwardness, would naturally also apply the basis of identifying such class not because they belong to a particular religion, race, caste, occupation etc., but because they are a socially and educationally backward class. (***Mandal*** para-449) For identifying backwardness in the non-Hindu collectivities where the caste system is formally eschewed, Sawant,J had this to say :

"474. It is further not correct to say that the caste system is prevalent only among the Hindus, and other religions are free from it. Jains have never considered themselves as apart from Hindus. For all practical purposes and from all counts, there are no socially and educationally backward classes in the Jain community for those who embraced it mostly belonged to the higher castes. As regards Buddhists, if we exclude those who embraced Buddhism along with Dr. Ambedkar in 1955, the population of Buddists is negligible. If, however, we include the new converts who have come to be known as Nav-Buddhists, admittedly almost all of them are from the Scheduled Castes. In fact, in some States, they were sought to be excluded from the list of Scheduled Castes and denied the benefit of reservations on the ground that they had no longer remained the lower castes among the Hindus qualifying to be included among the Scheduled Castes. On account of their agitation, this perverse reasoning was set right and today the Nav-Buddhists continue to get the benefit of reservation on the ground that their low status in society as the backward classes did not change with the change of their religion. As regards Sikhs, there is no doubt that the Sikh religion does not recognize caste system. It was in fact a revolt againstit. However, the existence of Mazhabis, Kabirpanthis, Ramdasias, Baurias, Sareras and Siklingers and the demand of the leaders of the Sikhs themselves to treat them as Scheduled Castes could not be ignored and from the beginning they have been notified as a Scheduled Caste (see pp. 768-772 of Bol. I and p.594 of Vol. IV of the Framing of India's Constitution – Ed. B.Shiva Rao). As far as Islam is concerned, Islam also does not recognize castes or caste system. However, among the Muslims, in fact there are Ashrafs and Ajlafs, i.e., high born and low born. The Census Report of 1901 of the Province of Bengal records the following facts regarding the Muslims of the then Province of Bengal:

> "The conventional division of the Mahomedans into four tribes – Sheik, Saiad, Moghul and Pathan – has very little application to this Province (Bengal). The Mohamedans themselves recognize two main social divisions, (1) Ashraf or Sharaf and (2) Ajlaf. Ashraf means 'noble' and includes all undoubted descendants of foreigners and converts from high caste Hindus. All other Mohamedans including the occupational groups and all converts of lower ranks, are known by the contemptuous terms, 'Ajlaf', 'Wretches' or 'mean people' : they are also called Kamina or Itar, 'base' or Rasil, a corruption of Rizal, 'worthless'. In some places a third class, called Arzal or 'lowest of all', is added. With them no other Mahomedan would associate and they are forbidden to enter the mosque or to use the public burial ground.

Within these groups there (sic) castes with social precedence of exactly the same nature as one finds among the Hindus.

1. Ashraf or better class Mohamedans:
   (i) Saiads, (ii) Sheikhs, (iii) Pathans, (iv) Moghul, (v) Mallik, (vi) Mirza.
2. Ajlaf or lower class Mohamedans:
   (i) Cultivating Sheikhs, and other who were originally Hindus but who do not belong to any functional group, and have not gained admittance to the Ashraf Community e.g. Pirali and Thakrai, (ii) Darzi, Jolaha, Fakir and Rangrez, (iii) Barhi, Bhathiara, Chik, Churihar, Dai, Dhawa, Dhunia, Gaddi, Kala, Kasai, Kula, Kunjara, Laheri, Mahifarosh, Mallah, Niliya, Nikari, (iv) Adbad, Bako, Bediya, Bhat, Chamba, Dafali, Dhobi, Hajja, Mucho, Nagarchi, Nat, Panwaria, Madaria, Tuntia.

3. Arzal or degraded class:
Bhanar, Halalkhor, Hirja, Kashi, Lalbegi, Mangta, Mehtar.

The Census Superintendent mentions another feature of the Muslim social system, namely, the prevalence of the 'Panchayat system'. He states:

> " The authority of the Panchayat extends to social as well as trade matters and … marriage with people of other communities is one of the offences of which the governing body takes cognizance. The result is that these groups are often as strictly endogamous as Hindu castes. The prohibition on inter-marriage extends to higher as well as to lower castes, and a Dhuma, for example, may marry no one but a Dhuma. If this rule is transgressed, the offender is at once hauled up before the Panchayat and ejected ignominiously from his community. A member of one such group cannot ordinarily gain admission to another, and he retains the designation of the community in which he was born even if he abandons its distinctive occupation and takes to other means of livelihood. Thousands of Jolahas are butchers, yet they are still known as Jolahas.'
>
> (See pp. 218-220 of Pakistan or Partiion of Indian by Dr. B.R.Ambedkar)"

475. similar facts regarding the then other Provinces could be gathered from their respective Census Reports. At present there are many social groups among Muslims which are included in the list of Schedule Caste in some States. For example, in Tamilnadu Labbais including Rawthars and Marakayars are in the list of Schedule Caste. This shows that the Muslims in India have not remind immune from the same social evils as are prevalent among the Hindus.

476. though Christianity also does not recognize caste system, there are upper and lower castes among Christians. In Goa, for example, there are upper caste Catholic Brahmins who do not marry Christians belonging to the lower caste. In many Churches the lower caste Christians have to sit apart from the high caste Christians. There are constant bickerings between Goankars and Gawdes who farm a clear cut division in Goan Christian Society. In Andhra Pradesh there are Christian Harijans, Christian Madarsm, Christian Reddys, Christian Kammas etc. In Tamilnadu, converts to Christianity from Scheduled Caste—Latin Catholics, Christian Shanarsm, Christian Nadars, and Christian Gramanai are in the list of Scheduled Caste. Such instances are many and vary from region to region.

477. the division of the Society even among the other religious groups in this country between the high and low caste is only to be expected. Almost all followers of the non Hindu Religions except those of the Zoroastrianism are converts from Hindu Religion and in the new religion they carried with them the caste as well. It is unnatural to expect that the social prejudices and biases, and the notions and feelings of superiority and inferiority, nurtured for centuries together would disappear by a mere change of religions.

478. the castes were inextricably associated with occupation and the lower and the mean occupations belonged to the lower caste. In the new religion along with the caste most of the converts carried their occupations as well.

> The backward classes among the Hindus, Non-Hindus can, therefore, easily be identified by their occupations also. Whether, therefore, the backward classes are identified on the basis of caste or occupations. The result would be the same. For it will lead to the identification of the same collectivities or communities. The social groups following different occupations are known among Hindus by the caste named after the occupations, and among Non-Hindus by occupations by names. Hence, for identifying the backward classes among the non-Hindus, their occupations can furnish a valid test. It is for this reason that both Articles 15(4) and 16(4) do not use the word ' caste' and use the word 'caste' which can take within its fold both the caste and occupational groups among the Hindus and non-Hindus." (***Mandal****)*

Sawant,J also concluded that economic criteria by itself would not sustain an identification of backward class. Mere poverty or economic considerations cannot be a criterion for identifying backward class of citizens under Art.16 (4). Poverty runs across all barriers, the nature and degree of economic backwardness and its causes and effect therefore vary from section to section of population; even the poor among the higher castes are socially as superior to the lower castes as the rich among the higher castes; their economic backwardness is not on account of social backwardness and the educational backwardness of some individuals among them may be on account of their poverty in which case economic props alone may enable them to gain an equal capacity to compete with others. On the other hand, those who were socially backward are also educationally backward for that reason, their economic backwardness being the consequence of both their social and educational backwardness. Even the educational backwardness of these classes is not on account of their economic backwardness alone but is mainly on account of their social backwardness; mere economic aid will not enable them to compete with others, particularly with those who are socially advanced and their social backwardness is the cause and not the consequence either of their economic or educational backwardness. Sawant, J pointed out that Art.16 (4) is not aimed at economic upliftment or alleviation of poverty, it is specifically designed to give a due share in the States power to those who have remained out of it mainly on account of their social and, therefore, educational and economic backwardness. The learned Judge emphasized that the backwardness contemplated by Art.16(4) is a backwardness, which is both, the cause and the consequence of non-representation in the administration of the country and all other kinds of backwardness are irrelevant for the purpose of Art.16 (4). He reemphasized that mere economic or educational backwardness which is not the consequence of social backwardness, cannot be a criterion of backwardness for Art.16 (4) (***Mandal*** Paras.480 to 484)

> " *It is, therefore, clear that economic criterion by itself will not identify the*

backward classes under Article 16(4). The economic backwardness of the backward classes under Articles 16(4) has to be on account of their social and educational backwardness." (***Mandal*** - para-491).

In ***Mandal,*** B.P.Jeevan Reddy,J wrote an opinion for himself, Kania, CJ, Venkatachaliah and Ahmadi, JJ. The learned Judge pointed out (***Mandal*** Para 746) that in the context of Art.16(4), the meaning of the expression backward class of citizens has been the single most difficult question tormenting this nation. As the expression has not been defined in the Constitution, we would humbly add that the same is the position with regard to elucidating the meaning, content and contours of social backwardness. After a painstaking and meticulous analysis of judicial precedents, reference to a lexicographic authority the Debates in the Constituent Assembly and historical accounts of affirmative action programmes for Backward classes including in pre-independent times, Reddy,J recorded the conclusion that the words "*backward class of citizens—not adequately represented in the services under the State*" means only those classes of citizens who were not so represented on account of their social backwardness.(***Mandal*** Para 774)

He further analyzed that in the Indian context social backwardness leads to educational backwardness and both of them together lead to poverty – which resultantly breeds and perpetuates the social and educational backwardness. Social and educational backwardness and poverty constitute a vicious circle feeding on each other, however "**the backwardness contemplated by Article 16(4) is mainly social backwardness**", held Justice Jeevan Reddy (***Mandal*** Para-788)

Thus both for Art.15 (4) and 16(4), satisfaction as to social backwardness as the primary criterion, for legitimate entitlement to the benefits of reservations, is a *sine qua non.*

Reddy,J while holding that a caste can and is quite often a social class in India and if a caste is backward socially, would be a backward class for the purposes of Art.16(4), held that in respect of non-Hindu communities, there are several occupational groups, sects and denominations which for historical reasons are socially backward. They too represent backward social collectives for the purposes of Art.16 (4). (***Mandal*** -Para-796-797).

On an analysis of the judicial precedents since ***Venkataramana***, Reddy,J culled out the synthesis of earlier precedents pointing to the integral connection between caste, occupation, poverty and social backwardness and held that in the Indian context, lower castes are and ought to be treated as Backward Classes(***Mandal*** - para 765). He also pointed out that in India and in the context of the

Hindu community, caste is nothing but a social class – a socially homogeneous class. It is also an occupational grouping with the difference however that its membership is hereditary and involuntary. Even when a person ceases to follow the occupation of the caste he is born into, he still remains and continues to be a member of the group; the lowlier the occupation the lower is the social standing of the class in the graded hierarchy and in rural India occupation-caste nexus is the reality even today (***Mandal*** para.779).

On behalf of the State, the respondents and interveners who support the legitimacy of the Ordinance, contend that both ***Mandal*** and ***Muralidhar*** have clearly and unequivocally ruled that the Muslim community as a whole could be categorized as backward class. Reliance for this contention is predicated upon what is stated in para-782 of ***Mandal*** (Jeevan Reddy,J). The relevant portion of the Para reads as under:

> *"782. Coming back to the question of identification, the fact remains that one has to begin some where – with some group, class or section. There is no set or recognized method. There is no law or other statutory instrument prescribing the methodology. The ultimate idea is to survey the entire populace. If so, one can well begin with castes, which represent explicit identifiable social classes – groupings, more particularly when Article 16(4) seeks to ameliorate social backwardness. What is unConstitutionalwith it, more so when caste, occupation poverty and social backwardness are so closely intertwined in our society. [Individual survey is out of question, since Article 16(4) speaks of class protection and not individual protection]. This does not mean that one can wind up the process of identification with the castes. Besides caste (whether found among the Hindus or others) there may be other communities, groups, classes and denominations, which may qualify as backward class of citizens.* ***For example, in a particular State, Muslim community as a whole may be found socially backward. (As a matter of fact, they are so treated in the State of Karnataka as well as in the State of Kerala by their respective State Governments). Similarly, certain sections and denomination among Christians in Kerala who were included among Backward communities notified in the former princely State of Travancore as far back as in 1935 may also be surveyed and so on and so forth.*** *Any authority entrusted with the task of identifying backward classes may well start with the caste. It can take caste 'A', apply the criteria of backwardness evolved by it to that caste and determined whether it qualifies as a backward class or not. If it does qualify, what emerges is a backward class, for the purpose of clause (4) of Article 16. The concept of 'caste' and in this behalf is not confined to castes among Hindus. It extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice. Having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes. For example it may take up the Muslim community (After excluding those sections, castes and groups, if any, who have already been considered) and find out whether it can be characterized as a backward class in the State or region, as the case maybe. The approach may differ from State to State since the conditions in each State may differ. Nay, even within a State, conditions may differ from region to region. Similarly, Christians may also be considered. If in a given place, like Kerala there are several denominations, sections or divisions,*

each of these groups may separately be considered. In this manner, all the classes among the populace will be covered and that is the central idea. The effort should be to consider all the available groups, sections and classes of society in whichever order one proceeds. Since caste represents an existing, identifiable, social groups, spread over an overwhelming majority of the countries population, we say one may well begin with caste, if one so chooses, and then go to other groups, sections and classes." **(emphasis is ours)**.

It must be noticed that what was stated in para-782 was in the context of the methodology to be adopted for identification of backward class of citizens. The sentence in para 782 : ***"For example, in a particular State, Muslim community as a whole may be found socially backward."***, cannot be read or interpreted out of the context in which that statement was made. The statement can truly and fairly be understood only as pointing out to a theoretical possibility of the entire Muslim community in the State being found backward if (**and only if**) such a religious collective does not comprise clearly identifiable insularities of backward groups and classes (backward in the Arts. 15 and 16 context). The sentence cannot also be understood as a ratio declaring that the Muslim community as a whole, in any or every State, is backward in the constitutional context of affirmative action. In the same paragraph a factual example of the Muslim community having been treated as socially backward in the States of Karnataka and Kerala, has been recorded. This cannot be understood as upholding the validity of the treatment of the entire Muslim community of these States as backward. No such *lis* was presented nor is this part of the Judgment a pronouncement on the validity of Muslim reservations in Karnataka and Kerala. The reliance placed on the ***Muralidhar*** decision in support of this contention is equally misconceived. Sudarshan Reddy J, held in ***Muralidhar*** : *"Muslims as a group are entitled to affirmative action/social reservations within the Constitutional disposition, provided they are identified as social and educational backward class for the purpose of Art.15(4) and backward class of citizens u/Art. 16(4). Providing social reservation to the Muslim community or sections or groups amongst them in no manner militate against secularism which is a part of the basic structure of the Constitution."* [***Muralidhar*** para 249(1)(b)]. A reading of this curial opinion in ***Muralidhar***, in which the above conclusions are recorded in para 249(1)(b), would show that this conclusion is a mere summation of the principles in ***Mandal***. This part of the ***Muralidhar*** opinion cannot fairly and legitimately be understood as an affirmation by this court that all Muslims constitute a class or even that if they constitute an integral social class, they are a backward class (in the Art. 15(4) and 16(4) context). As we have concluded in respect of the ***Mandal*** observations, the

observations in ***Muralidhar*** in this area represent merely an expression of a theoretical or normative possibility of all Muslims being considered for the benefits of Art. 15(4) and 16(4), if the Muslim community (in a State) does not contain in its collective, classes or groups which can be identified and if the entire community satisfies the tests relevant to legitimate extension of the benefits under Art. 15(4) and 16(4). Any other view would render the direction in ***Muralidhar*** [that a Commission be constituted to consider the Muslim community for characterization as a backward class], meaningless.

The fundamental assumption underlying the claim of the Muslim community *enbloc*, (for the benefits of a distinct quota or reservation within the dispensation of the enabling constitutional architecture of Arts. 14 to 16 of the Constitution), is predicated upon the assertion of the homogeneity of this religious collective in contra-distinction to the heterogeneity of the Hindu collective. In the considered view of this court the truth, relevance and rationality of this assumption must be examined. This has important implications not only in the context of the basic values that permeate the theme of our constitutional order, but also for the equilibrium of the plural Indian society, the maintenance of which is the essential agenda of our Organic Document.

At some level of abstraction, all physical and sociological phenomena, entities, concepts and events, which now appear dissimilar, have a singularity. Even the universe is predicated as having evolved from the singularity of the big bang.

At the point of origin (however and whenever it may have occurred) humans could all have constituted a homogeneous class (in the Adam and Eve paradigm). The very label 'Hindu' as a distinct social collective among the larger human collectivities denotes a recognized and established level of homogeneity. Some common characteristics of faith, belief, worship, ritual, or cultural practices characterize and inform the identity of all persons known as Hindus. This is similarly the position of other recognized religions as well.

One is often encouraged to believe that every religion arrived suddenly as a comprehensive, fully developed, coherent and immutable edifice of thought at a defined point in time. Schools of thought or systems of belief, in reality however, are known to be products of evolutionary, prolonged, gradual, often haphazard processes of accretions, mutations or novations of inherited thoughts and beliefs from earlier periods; including accretions of prior religions, beliefs, practices and rituals. There is much trial and error, much uncertainty, much schism, much compromise, improvisation and adaptation from the accretions and often a great

deal of historical accident which substrates a religion, its doctrinal and practical content and context. There are random factors, arbitrary elements, distortions and modifications dictated by chance or simple social or political expediency of the time or even geo-specific, climatic or other natural conditions which inspire and contribute to the context and content of much of religious thought, belief, cultural practice or the habits of peoples.

Modern researches into and historical studies of the several religions and philosophical schools are increasingly discovering the trails of the influences of many earlier beliefs and primitive, even pagan religious practices on many later religions, faiths and beliefs and even in the rituals, which are inherent in them. There is a distinct degree of homogeneity and common lineage even amongst the several religions.

Even on the religious or philosophical plane there are schisms and distinct doctrinal positions in Hinduism - the Dwaita, Adwaita and Visishta-Adwaita schools are but illustrative of this aspect. Such distinctions mark other religions as well – ancient medieval or recent. Judaism is known to have been the product of accretions from earlier Sumerian thoughts beliefs and practices; Judaism itself is considered to have shifted from the earlier messianic tradition to the rabbinical. Christianity even at the point of origin and through its evolution is known to have fundamental doctrinal distinctions – between the Pauline and the Nazarean or Thomasine schools apart from several heresies some of which developed as distinct denominations of Christian thought and have transformed into new denominational orthodoxies – recent researches, archeological discoveries and studies of the Nag Hammadi scrolls bring ever new light and shatter several assumptions long held. Apart from the doctrinal schisms – *Sunny and Shia* principally, in the Islamic thought composite; there are a number of other non-theological distinctions and insularities as well.

Abraham and Moses, Joseph and Jesus, of the Jewish/Judaic and Christian tradition are acknowledged prophets of Islam. Sumerian, Greek, Egyptian, Mesopotamian, Judaic, Judeo-Christian and Christian thoughts, beliefs and traditions have fertilized the Islamic faith, though with doctrinal refinements. The schismatic tradition of the Samaritans, the practices and faith normata of the Sadducees and the Pharisees, the Greco-Roman values, attitudes and mores, the asceticism of the Esseenes, the Therapeutics, the earlier Gnostic values and those of the Maccabees, the Zadokites and the Zealots have all contributed to what evolved as the Christian faith composite. This evolution influenced Islamic thought, faith and tradition and also contributed to its schism. As applied to religion,

philosophy, belief, faith or even ritual – *homogeneous* or *heterogeneous* are adjectival labels that are irrelevant without a defining context.(*) Sawant. J points out the divisions amongst Muslims in his judgment (**Mandal** – Paragraphs 474,475)
.

Commensality and homogeneity or distinction, insularity and heterogeneity are coexisting, endemic and the inherent characteristics of every human endeavor from the misty dawn of human origins to the complex present. Coalescence and distinction are the *ying and yang* of the human condition. Every religion is therefore homogeneous at a level as also heterogeneous at another. Homogeneity or heterogeneity is an adjectival description that is appropriate and relevant only in a specific context and not beyond or generally.

It has however, long been recognized that it is not these characteristics (that inform the homogeneity of the Hindus or other religious collectives), which are relevant to the constitutional discourse of equality and equal opportunity and affirmative programmes of the State, tailored for eradicating the effects of the prejudicial insularities in the Indian society.

In the constitutional context, we are not concerned whether Hindus, Muslims, Christians, Parsis and other religious communities are homogeneous communities, in the religious, theosophical or philosophical sense. Such inquiry is irrelevant and was always so. The relevant inquiry is whether there are identifiable and distinct insularities of backwardness (in the Arts. 14 to 16 sense) in any of the facially or apparently homogeneous collectivities. From ***Champakam Dorairajan to Mandal*** *the* several decisions of the Supreme Court record the existence of such insularities in the Hindu collective. These insularities are principally known and recognized as castes in the Hindu context. The history of the identification of such insularities and its recording and recognition in judicial precedents since the dawn of our Republic has been chronicled in the several judgments of ***Mandal***. Clear distinctions and divisions in the Hindu collective, the contemporaneous social significance of such distinctions, the relevance of the distinctions to the identification of Backward classes for social engineering by the State and in the context of the equality injunctions of the Constitution, have also been elaborately and meticulously analyzed in ***Mandal***.

The juridical history of affirmative action in India verifies the inference that the insularities in the Hindu collective are clear and marked; these distinctions, based predominantly on the caste divisions have therefore legitimized caste-based identification of Backward Classes in the Hindu community. Long, historically established and finding mention in the Constituent Assembly Debates, the caste

insularities of the Hindu collective have justified classifications on caste basis. The judicial branch has approved such classification, though facially the bases of the classification fall foul of the prohibitions of Arts. 15 (1) and 16 (2). This does not however establish the affirmative action context homogeneity of other religious communities nor does it establish the absence of social distinctions in other religious communities, including the Muslim community.

The concurring judgment of Sawant,J records the existence of clear divisions even in the Muslim community—divisions which constitute insularities that are relevant in the context of Articles 14 to 16 of the Constitution and the affirmative action programmes of the State (***Mandal*** – Paras 474 to 478). Pandian.J has recorded existence of some form of casteism even in the Muslim and Christian communities –(***Mandal*** – Paragraph 84 to 95). Jeevan Reddy.J has dealt with the fact of the caste system percolating even to the Non-Hindu communities, of course to varying extents; among south Indian Christians, with as much rabidity as it was practiced among the Hindus; the distinctions among Ashrafs and Non-Ashrafs in the Muslim community and that among the Non-Ashrafs (native converts) the caste distinctions are practiced with similar acuity as among Hindus, including the practice of endogamy. Sub-groups exist among both the Ashrafs and the Non-Ashrafs (***Mandal*** – Paras 777, 778). *"Among Non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons are socially backward. They too represent social collectivities for the purposes of Article 16(4)."* –[Jeevan Reddy.J, ***Mandal*** – Para 859 (3)(a)]. The infiltration of the caste system into other religious communities including the Muslims, Christians and the Sikhs, including commensality and connubial rituals and emphasis on inherited social status or rank, has been noticed in the judgment of Sahai,J (***Mandal*** paras 602 to 606).

The ***Mandal*** analyses and conclusions as to the heterogeneity, existence of classes, groups and caste resembling insularities in the Muslim aggregate, are based on a wealth of material and well researched and documented historical and social studies.

A claim was presented to the National Commission for Backward Classes (NCBC) for inclusion of the Muslim community in the Central List of Backward Classes for Andhra Pradesh. The NCBC, in its advice to the Central Government, bearing Reference No. AP.64-67/2002, dt: 4.7.2002, rejected the claim for *en bloc* inclusion of the Muslim community in the List of Backward Classes. The NCBC after referring to the **Anantaraman** and **Muralidhar Rao** Commission reports and on recording that as per the Anthropological Survey of India's publication "India's

Communities", there are 24 Muslim castes/communities in Andhra Pradesh, concluded that Muslims are not a socially homogeneous class or community. Observing: "*Muslim community is not a socially homogeneous class of community*", the NCBC report concluded that many of the Muslim groups or sections among Muslims enjoy a high social status. Consequently, the claim of Muslims for inclusion in the list of backward classes was not recommended.

As earlier stated we have avoided copious reference to the several prior decisions of the Supreme Court on issues where ***Mandal*** has spelt out the ratio and had considered earlier judgments of that court. ***Mandal***'s analyses of the earlier judgments are binding on this court. Suffice it to record that there is abundant precedential, historical, social and other authority for the conclusion that the Muslim community is heterogeneous, comprising distinct, identifiable and already identified, classes and groups (in the Articles 15 and 16 context).

The **Anantharaman Commission** had recommended and the State Government had included, Dudekula, Laddaf, Pinjari, Noorbash as item No.5 in Group B, and Mehtar Muslims as item No.39 in Group A in the Backward Classes list of the State. These classes belong to the Muslim Community. In ***State of Andhra Pradesh Vs. Balaram (***[10]***)*** (***Balaram)*** the validity of the Backward Classes list (including the aforementioned classes amongst the Muslim community) was upheld.

By prior and extant executive declaration and recognition and judicial affirmation too, that there are classes and groups within the Muslim collective, is thus an established fact.

The Hindu collective was long recognized in historical social and anthropological studies, dictionaries and in recorded history, in census reports, in the Constituent Assembly Debates and in a succession of judgments of the Supreme Court, to be a heterogeneous social aggregate of several castes (what ***caste*** denotes and signifies has been extensively considered in the several opinions of ***Mandal***). Over a period of time, prior to and after the independence of India, several States and the Federal Government, have identified some of the castes in the Hindu collective as Backward Classes for extending affirmative State programmes to the Classes, in purported exercise of the enabling constitutional dispensation under Articles 15 and 16 of the Constitution. Caste based identification of Backward Classes was questioned, time and again. These challenges were considered from ***Champakam Dorairajan*** to ***Mandal*** and beyond too. Caste as the basis for identification of Backward Classes and the constitutional validity of such basis came up for critical consideration in ***M.R.Balaji***

V. State of Mysore ([11] ***)*** (***Balaji***). Having regard to the deeply entrenched caste system in the Hindu collective, its ossified hierarchical impact, in the judicial opinions from and since ***Balaji*****,** caste as a working criterion for identification of social and educational backwardness, gradually and inexorably came to be accepted as a constitutionally benign criterion of classification (for the purposes of Articles 15 and 16) --- ***P.Rajendran V. State of Madras (*** [12] ***)*** (***Rajendran***), ***Trilokinath V. State of Jammu and Kashmir (*** [13] ***)*** (***Trilokinath***) ***State of Andhra Pradesh V. U.S.V.Balaram(*** [14] ***)*** (***Balaram***), ***A.Periakaruppan V. State of Tamil Nadu (*** [15] ***)*** (***Periakaruppan***); ***K.C.Vasanth Kumar V. State of Karnataka (*** [16] ***)*** (***Vasanth Kumar***) and ***Mandal*****.** In several decisions including **Balaji, Vasanth Kumar** and **Mandal,** the osmotic influence of the initially Hindu-centric caste system and its insular and discriminatory propensities, on the other religious collectives have been recognized and recorded in varying degrees of detail, but clearly. The caste system in the Hindu collective is recognized and established to have had a pejorative social impact and effect on the achievement of a functional measure of *equality before the law and equal protections of the laws*, that is relevant in the constitutional context of Articles 14 to 16 of Constitution. The engendered insularity and the consequent social discriminatory effect of this entrenched hierarchical tradition has been recognized and is recorded to have permeated several other social collectivities and the Muslim collective as well. Muslims do not constitute a singular social collective in the context of Articles 14 to 16. This conclusion is irresistible and unavoidable.

The State of Andhra Pradesh, pursuant to the report of the **Anantharaman Commission**, identified Dudekula, Laddaf, Pinjari or Noorbash and Mehter Muslims as Backward Classes and has included these distinct classes from the Muslim aggregate, in the list of Backward Classes for the State, in groups “A” & “B” in the 1970 A.P. Reservation Order. As a consequence of such identification and recognition by the State and inclusion in the list of Backward Classes, these included classes and groups of the general Muslim community cannot be considered as Muslims in the context of any discourse under Articles 15(4) and 16(4) of the Constitution. These groups are Backward Classes of citizens in the above constitutional context and constitute distinct classes in the amorphous Muslim social collective. The rest of the members of the Muslim community alone constitute the as yet unidentified and uncharacterized social and facially religious

collectivity for the purposes of any analysis and conclusion as to satisfaction of the relevant criteria for extending affirmative action benefits under Article 15(4) and 16(4). This conclusion is constitutionally compelling particularly as the Commission was satisfied " … *that the existing Backward Classes have not attained levels of advancement warranting a revision of existing reservations*"(Recommendations of the Commission – Page 89 of the report). The classes or groups within the Muslim community as have been identified and included in the list of Backward Classes, therefore continue to be Backward Classes. To reemphasize, the classes included in the Backward Classes list of the State are a distinct class in the constitutional context of Articles 15(4) and 16(4).

Considering the entirety of the Muslim population of the State including those amongst this religious community who have been included in the list of Backward Classes, as an integrated, homogenous social class for the purposes of data collection, statistical analysis--for social, educational and economic backwardness class determination, involves the vice of treating well established, recognized and distinct constitutional classes as one, leading to aberrant results based on unconstitutional normative assumptions.

Chapter-II of the report of the Commission extracts the reference made by the Government of Andhra Pradesh to the Commission. The Commission was requested to advise the Government whether to include the Muslim community within the purview of backward classes of citizens under Art. 15(4) and 16(4) of the Constitution.

Pursuant to the reference, the Commission proceeded on the assumption that all Muslims (residing in the State of Andhra Pradesh) constitute an integral and homogeneous social class for the purpose of evolving criteria, survey and data collection, application of the criteria to the collected data for analysis and conclusion as to backwardness, in the Art. 15(4) and 16(4) context. The Commission proceeded to consider even those classes of Muslims already identified and recognized as backward classes, as constituting the composite of the Muslim aggregate residing in the State, for its exercise. The population of the Muslims residing in the State, as considered by the Commission comprised the already identified backward classes amongst the Muslim community; the primary and secondary data collected or considered by the Commission in relation to areas of education, rural and urban habitat and employment in various sectors such as agricultural labour, house-hold, industry workers and others; worker population ratio; the analysis of monthly per capita expenditure; land cultivation and holding; share in the rural employment programmes of the Government and in every area

including public employment, the Commission considered the entire Muslim community including the identified and recognized Backward Classes amongst them.

That homogeneity of the Muslim collective was the basic premise and assumption of the Commission, is beyond dispute. In Paragraph 2 of its " Recommendations", in Chapter-IX of its report, the Commission recommended that Dudekula, Laddaf, Pinjari/Noorbash and Mehtar communities also be included in the event of reservations being provided for members of the Muslim community, "***in the homogeneous group of Muslims"***. The operative recommendation of the Commission also concludes that Muslims constitute a homogeneous social class -– "-------**the Muslims in general are socially and educationally backward and they are fit to be included in the list of Backward Classes as a separate category under Group "E" with 5% reservations for the purpose of Articles 15(4) and 16(4) of the Constitution of India**" (Final Recommendation (a)—page 90 of the printed report of the Commission.) Final Recommendation (c) of the Commission is also "---- **the Muslim groups like Dudekula, Laddaf, Pinjari/Noorbash and Mehtar, who are at Serial No.5 of Group "B" and Serial No.39 of Group "A" respectively in the list of Backward Classes may be withdrawn as they are included in the general quota of Muslims."** The entirety of the Commission's exertions are thus predicted and have proceeded to conclusions and recommendations, on the normative substrate of the homogeneity of the Muslim collective, a clearly unfounded and illegal premise.

The Muslim community is a heterogeneous social class. This is a clearly recognized and established fact as we have analyzed and concluded above. Certain classes/groups in the Muslim community are already identified as distinct classes and groups; have been recommended by the **Anantaraman Commission** for inclusion in the list of backward classes; and the State has included such recommended and specified groups/classes of the Muslim collective, in the list of backward classes for the State. The Commission's exercise, in the computation of the population of the Muslim community residing in the State, collection of data, identification and application of evolved criteria to the gathered data, its analyses and conclusions as to the social, educational and economic backwardness and of the inadequate representation in the public services of the State, of the Muslims is based on the Commission's clear assumption that all Muslims residing in the State comprise a composite and homogenous social class. The failure of the Commission to recognize the established heterogeneity of the Muslims, its failure to proceed on data collection, statistical, social, educational and economic

analyses of the data so collected, restricted to Muslims excluding those classes/groups of Muslims already identified and recognized by the Government as backward classes, constitutes a fatal flaw in the conceptual foundation, adopted methodology and social survey of the Commission's exercise and introduces an irredeemable infirmity to its conclusions and recommendations.

Classes of Muslims already recognized and identified as backward classes constitute a dissimilar and distinct class from those Muslims who have not been so identified. Conceptually treating such dissimilar classes as one violates the established principle of classification, a doctrine underwriting the equality injunctions mandated by Articles 14 to 16 of Constitution. The equivalence of the Commission's endeavour and exercise, in the Hindu context, would be to take the entire Hindu collectivity including the several castes, groups and classes including the notified Scheduled Castes and Scheduled Tribes and other Backward Classes, and including the indisputable forward castes among the Hindus, like say the Brahmins, proceeding to survey, collect data, apply the criteria to such data and thereafter characterize the entire Hindu population including Brahmins as a backward class. Such an exercise would compellingly require to be characterized as grotesque and unconstitutional. This is what the exercise of the Commission is, but for the difference that the Commission's exercise involved the entirety of the Muslim collective.

In dealing with the methodology and process of identification of Backward Classes of citizens, Jeevan Reddy,J, while clearly recording the principle that there is no set or recognized method and no law or other statutory instrument prescribing the methodology, yet spelt out the broad methodology that could be adopted in proceeding to identification of Backward Classes of citizens. Justice Reddy, said; " ***The ultimate idea is to survey the entire populace. If so, one can well begin with castes, which represent explicit identifiable social classes/groupings, more particularly when Article 16(4) seeks to ameliorate social backwardness. What is unconstitutional with it, more so when caste, occupation poverty and social backwardness are so closely intertwined in our society?*** *(Individual survey is out of question, since Article 16(4) speaks of class protection and not individual protection). This does not mean that one can wind up the process of identification with the castes.* ***Besides castes (whether found among Hindus or others) there may be other communities, groups, lasses and denominations, which may qualify as backward class of citizens.*** *For example, in a particular State, Muslim community as a whole may be found socially backward. (As a matter of fact, they are so treated in the State of*

Karnataka as well as in the State of Kerala by their respective State Governments). Similarly, certain sections and denominations among Christians in Kerala who were included among backward communities notified in the former princely State of Travancore as far back as in 1935 may also be surveyed and so on and so forth. ***Any authority entrusted with the task of identifying backward classes may well start with the castes. It can take caste "A" apply the criteria of backwardness evolved by it to that caste and determine whether it qualifies as a backward class or not.*** *If it does qualify, what emerges is a backward class, for the purposes of clause (4) of Article 16.* ***The concept of 'caste' in this behalf is not confined to castes among Hinds. It extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice. Having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes. For example, it may take up the Muslim community (after excluding those sections, castes and groups, if any, who have already been considered) and find out whether it can be characterized as a backward class in that State or region, as the case may be.*** *The approach may differ from State to State since the conditions in each State may differ. Nay, even within a State, conditions may differ from region to region.* ***Similarly, Christians may also be considered. If in a given place, like Kerala, there are several denominations, sections or divisions, each of these groups may separately be considered. In this manner, all the classes among the populace will be covered and that is the central idea. The effort should be to consider all the available groups, sections and classes of society in whichever order one proceeds.*** *Since caste represents an existing, identifiable, social group spread over an overwhelming majority of the country's population, we say one may well begin with castes, if one so chooses, and then go to other groups, sections and classes.*" (***Mandal*** para 782)

(**emphasis is ours**)

When Justice Reddy, in ***Mandal*** illustrated the principles for identification of Backward Classes by stating that a Commission *" may take up the Muslim community (after excluding those sections, castes, groups, if any, who have already been considered) and find out whether it can be characterized as Backward Class in that State or region*," the learned Judge was clearly emphasizing an established principle that from the generality of a social collective those groups/classes of persons already identified, recognized or notified as Backward Classes, constitute a distinct class in the constitutional context, who

can not be clubbed with the generality of the collective, for an exercise of equal opportunity State action including an exercise under Article 15(4), and 16(4) of the Constitution.

The entirety of the Commission's exercise and its conclusions fall foul of the above impregnable constitutional norm of classification.

The Commission appears to have clearly misconstrued the directions in the ***Muralidhar*** decision(Para 249 1(b)). As we have earlier pointed out, this conclusion in ***Muralidhar*** was merely a summary of the ***Mandal*** decision and the ***Mandal*** observations in this regard merely pointed out that Muslims as a whole may be considered for identification and recognition as a Backward Class. We have also held that there is nothing in the ***Mandal*** or ***Muralidhar*** decisions which could be characterized as a declaration, in law or on fact, that the entire Muslim collective ought to be considered for Backward Class recognition or that the Muslim community is homogeneous without social class insularities. In any event, that judgments must not be read as Statutes is a well established principle.

On the above analysis, the survey, collection of data, analyses, conclusions and the recommendations of the Commission transgress fundamental norms of classification principles, principles that underscore effectuation of the equality injunctions of Articles 14 to 16 of the Constitution. In treating the identified Backward Classes of Muslims in the State of Andhra Pradesh and the other Muslims as an integral homogeneous social class, as the basis for its entire exercise, the Commission was led into a fatal error from which there is no redemption. As a consequence its exercise is rendered an exercise in futility. For this error its report including the Recommendations therein must perish as must the Ordinance based exclusively on the Recommendations of the Commission.

Issue (b):

> Whether identification of the entire Muslim community and its declaration as a Backward Class is the product of woefully inadequate data; irrelevant and arbitrary criteria, unrelated and contrary to the Constitutional discipline and the substantive requirements of Articles 14,15 and 16 of Constitution of India, irrational and arbitrary analysis and ***ipse dixit*** conclusions recorded by the Commission?

In his judgment in this case Justice Rao, has painstakingly and meticulously subjected the report of the Commission to extensive analyses, applying the appropriate standard of judicial scrutiny. I have already recorded at the beginning of this Judgment, my concurrence with the conclusion of Justice Rao that the report of the Commission and its Recommendations cannot be sustained. I will briefly record additional reasons for the concurrence. These reasons are by way of emphasis of the reasons already recorded by Justice Rao for the conclusion.

That social backwardness is the major ingredient and the common denominator for a legitimate State action/programme referable to Art.15(4), and 16(4) of the Constitution, is the basic theme that permeates the three majority opinions in ***Mandal*** . Pandian,J pointed out that " *The degree of importance to be attached to social backwardness is much more than the importance to be given to the educational backwardness and economic backwardness, because in identifying and classifying a section of people as backward class within the meaning of Art.16(4) for the reservation of appointments or posts, the ' social backwardness' plays a predominant role*". (***Mandal*** para-117).

Sawant,J after a searching analyses of textual, social and precedential authority on the question, concluded that economic or educational backwardness alone cannot constitute a relevant criterion in the context of Arts.15(4) and 16(4) and poverty too cannot provide the sole test of backwardness. Sawant, J concluded; "*A class which is not socially and educationally backward though economically or even educationally backward is not a backward class for the purposes of the said clause*" (***Mandal*** para 492).

Earlier, elaborating on why economic criteria should not be considered determinative in the Arts.15(4) and 16(4) context, Sawant,J concluded that social backwardness is the cause and not the consequence either of economic or educational backwardness. Sawant,J pithily summarized the relevant constitutional principle in this area. According to him, the backwardness contemplated by Art.16(4)] [as also by Art.15(4)], is the backwardness which **is both the cause and the consequence,** of the inability or incapacity of this class of citizens to compete with the generality of the population of the Republic and it is this consequence that results in inadequate representation in the public services of the State (***Mandal*** paras 482 and 484)

The opinion of Jeevan Reddy,J also reiterates and re-emphasizes the recurrent, regnant and established constitutional principle that in the context of Arts.15(4) and 16(4), it is mainly social backwardness that is relevant and that this is so notwithstanding that the expression 'social' is absent in clause(4) of Art.16 (in distinction to the phraseology of clause(4) of Art.15) (***Mandal*** paras 788 and 799).

Much reliance has been placed on behalf of the State Government and the interveners who support the Ordinance, on the observations in ***Mandal*** by Justice Reddy, in particular the following:

(a) *"Lowly occupation results not only in low social position but also in poverty; it generates poverty. "Caste – Occupation – Poverty" cycle is thus an ever present reality. In rural India it is strikingly apparent; in urban centers, there*

may be some dilution. But since rural India and rural population is still the overwhelmingly predominant fact of life in India, the reality remains. All the decisions since ***Balaji*** *speak of this "Caste – Occupation – Poverty" nexus. The language and emphasis may vary but the theme remains the same". (****Mandal*** *para 779)*

(b) "It goes without saying that in the Indian context, social backwardness leads to educational backwardness and both of them together lead to poverty- which in turn breeds and perpetuates the social and educational backwardness. They feed upon each other constituting a vicious circle". (***Mandal*** *para 788)*

(c) "Of course, social, educational and economic backwardness are closely inter-twined in the Indian context".[***Mandal*** *para 859(3)(c)]*

None of these observations in our considered view, support the claim that Justice Reddy had concluded that educational and economic backwardness lead to social backwardness. True it is, as very perceptively summarized by Justice Reddy, " Caste – Occupation – Poverty" cycle is a vicious phenomenon and educational and economic retardation accentuate the degree of social backwardness or at least perpetuate the same. The trigger that fertilizes this vicious cycle and is relevant in the constitutional context is however the social backwardness. The other factors (economic and educational) may perpetuate, accentuate or exacerbate social backwardness but these factors, as pointed out by Sawant, J (referred to supra), do not per se amount to social backwardness. "Caste – Occupation – Poverty" is undoubtedly a vicious cycle, caste normatively defines the social component and the trigger is social backwardness and primarily as a consequence of the caste or the social position of a group in the homo heirarchicus paradigm, endemic in the Indian context.

The Commission (Chapter VII) considered the criteria evolved and considered by various earlier commissions including the ***Anantaraman***, Nagan Gowda Committee, and ***Muralidhar Rao*** Commissions and in passing, the Mandal Commission too. At page 51 of its report the Commission recorded its preference for the criteria adopted by the Mysore Government in its order dated 26.7.1963 pursuant whereto the Mysore Government had directed reservation of seats in educational and technical colleges and institutions, *inter alia*, in favour of backward classes identified in terms of economic condition and occupation of groups of families *de hors* caste. The Commission adopted these criteria of (1) actual cultivator; (2) artisan; (3) petty businessmen; (4) inferior service (ie., those in

Class-IV in Government service and corresponding classes or services in private employment) including casual labour; and (5) any other occupation involving manual labour.

In ***R.Chitralekha and others v State of Mysore and others*** ([17]) (***Chitralekha***) the Supreme Court considered certain objections to the implementation of the Mysore Government's order dated 26.7.1963 whereby backward classes were identified only on economic and occupation criteria without reference to caste. The order of the Government of Mysore dated 26.7.1963 was however not challenged and the reservation programme under that order was also by way of a temporary measure. (*see* para-14 of AIR report) Earlier considering the challenge to the Mysore Government's action in the implementation of its order of 1963 the High Court relying upon the observations in ***Balaji***, had observed that the scheme adopted by the State was a very imperfect scheme and that in addition to occupation and poverty tests, the State should have adopted the 'caste' test as well as the 'residence' test in making the classification. Apprehending that these observations of the High Court would limit the State's future programmes of reservations, the correctness of the High Court's observations was canvassed before the Supreme Court, though as already stated the Government's order was not challenged either in the High Court or before the Supreme Court. It is in this context that in ***Chitralekha*** while clarifying the restricted relevance of the caste criterion in the identification of backwardness in the constitutional context and explaining the true principle laid down in ***Balaji***, the Supreme Court observed:

> *"It is therefore, manifest that the Government, as a temporary measure pending an elaborate study, has taken into consideration only the economic condition and occupation of the family concerned as the criteria for backward classes within the meaning of Art.15(4) of the Constitution. The order does not take into consideration the caste of an applicant as one of the criteria for backwardness."*

After recording that the validity of the Mysore Government order was not under attack (***Chitralekha*** para 14) the Supreme Court majority proceeded to consider the correctness of the observation of the Mysore High Court (that caste was an important basis in determining the class of backward Hindus and that the Government should have adopted caste as one of the tests). Clarifying the legal position deducible from ***Balaji,*** the Supreme Court held that the caste of a group of citizens may be a relevant circumstance in ascertaining the social backwardness but cannot be the sole or dominant test in that behalf. We have been unable to discover anything in ***Chitralekha*** which supports an inference or conclusion that the court had approved the Mysore Government order which exclusively

considered occupation and means criteria for determining backwardness in the State action which was a temporary measure. In ***Webster v Fall ([18])*** Sutherland J, observed: *" Questions which may lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."*

The Supreme Court in ***Chitralekha*** did not go into the validity of the Government order on the ground whether consideration of economic condition and occupation alone would form a legitimate basis for backward class identification. There was no attack on the Mysore Government's order and the discussion in Paras 14 to 21 (AIR report – Subba Rao, J, for the majority) does not spell out any principle or ratio that occupation and means test alone legitimise charecterisation as backward class, in the context of Art. 15(4). In fact the principal ground of attack of the Mysore Government's scheme of implementation of its order were that – (a) the Government did not issue any order to the selection committee in charge of admissions to Medical colleges, prescribing marks for interview or fixing criteria for allotting marks; (b) a letter purportedly written by the Secretary to the Mysore Government to the Director of Technical Education fixing percentage of marks to be allotted at the interview, was invalid as it did not confirm to requirements of Art. 166 of the Constitution; (c) the Government had no power to appoint the selection committee for admitting students to colleges on the basis of higher or different qualifications than those prescribed by the university and therefore the orders of the Government relating to admissions were illegal; (d) the system of selection by interview and *viva voce* examination was illegal as it permitted arbitrariness in the process of selection by interviews; and (e) selection of interviews is inherently repugnant to the doctrine of equality under Art.14.

A close analysis of ***Chitralekha*** shows that the order of the Mysore Government of 1963 was not attacked on the ground that the identification of backward class on the basis of the means and occupation tests alone is inconsistent with the constitutional doctrine under Art.15(4). Therefore ***Chitralekha*** provides no support to the legitimacy of occupation as the sole relevant criterion for determination of backwardness in general, or social backwardness in particular, in the context of Articles 15(4) and 16(4) of the Constitution.

After a very minute, intense, critical and clinical analyses of the criteria and methodology evolved, the Supreme Court majority in ***Mandal*** approved the criteria and methodology adopted by the Mandal Commission. The Mandal Commission identified 11 criteria (indicators) for identifying social and educational

backwardness. These criteria were again classified into social, educational and economic status indicators. The Mandal Commission also gave different values for the criteria in each of the categories – social, educational and economic. Social criteria (Four in number) were given a weightage of 3 points each; educational criteria (Three in number) a weightage of 2 points each; and economic criteria (Four in number) a weightage of 1 point each (a total of 22 points), with a maximum of 12 points given to the social criteria and only a minimum of 4 points given to the economic criteria. Even the education criteria had a mere half of the value of social criteria (6 weightage points). The Mandal Supreme Court while upholding the methodology and criteria adopted by the Mandal Commission, concluded that the primacy given to social indicators and the pride of place accorded to the criterion of social backwardness in identification and recognition of backward classes, was in accordance with the constitutional principle and purposes.

The Commission in the present case discarded the criterion of early marriages adopted by the Mandal Commission on the ground that it was not an objective criteria as it had relevance more to social custom than backwardness and that the custom of Sati and child marriage was commonly prevalent among the Rajputs of Rajasthan and did not denote social backwardness. The other social criteria adopted by the Mandal Commission were discarded by the Commission for this reason:

> *"Similarly certain educational and social criteria adopted by the Mandal Commission require individual survey because of unavailability of this data through any Governmental census. It is not possible to conduct this individual census by this Commission on any reasonable sample scale in the time frame mandated by the High Court. It is not practicable for this Commission to undertake this type of census in any extended time frame also in view of the constraints of its resources and administrative machinery."*

We are constrained to record that the above reason set out for rejecting the criteria which were held valid and relevant by the Constitution Bench of the Supreme Court (***Mandal***), is wholly irrational. The exercise of identifying backward classes is ever an arduous, a taxing and intense exercise that consumes time, involves substantial logistic and fiscal outlay for even the barest relevant survey collection and collation of data, analysis and conclusion. The principle underlying the Supreme Court's directive (in para 847 ***Mandal***) that this exercise should be entrusted to a permanent statutory body comprised of experts in the field and the reason underlying the enactment of the 1993 Act is the recognition that such exercise and its consequence have critical implications for the equilibrium of our civil society, for the very basic constitutional value of equality and extended impact

on vast sections of the Indian population, both on those who find inclusion for affirmative benefits and on those excluded from such benefits. The entire population of the country are stake holders who have a vital interest in this segmentation of the demographic composition of the Republic.

The task of identification of backward classes is invariably a delicate task and no compromise (of the essential substantive and procedural aspects) is acceptable, in the execution of this sensitive exercise of constitutional balancing of rights, expectations and opportunities of the peoples. The task of a Commission must be of the standard of a commanding performance rather than a performance on command, as the petitioners would colorfully characterize the report of the Commission. This is not to say that the Mandal criteria or methodology is the only appropriate or relevant criteria. From the text and texture of the report of the Commission it is apparent that the Commission considered that it had to record a conclusion regardless of whether time and organizational constraints permit a degree of exercise relevant to the goal obligated by the Constitution and the provisions of the 1993 Act.

I have already recorded my concurrence with the judgment of Justice Rao, as to the infirmity and unsustainability of the report of the Commission. I record my broad concurrence with His Lordship's analysis of the report of the Commission and with the conclusion that the Commission failed to evolve any relevant criteria for identifying social backwardness and that the Commission's conclusion as to social backwardness of the Muslim community is a conclusion based on no relevant evidence or material.

At page 82 of its report, the Commission recorded its disagreement with the conclusions of the Muralidhar Rao Commission's report rejecting the claim of the Muslim community for recognition as a backward class. The Commission stated that the reasons recorded by the Muralidhar Rao Commission were incorrect and the issue is not about social discrimination within the Muslim community or whether some group or individual is more prosperous than them, but whether Muslims as a class are socially and educationally backward in comparison with the society at large. Having thus vaguely framed the agenda for analysis, the Commission recorded:

> *" From the above statistics the scenario which emerges is that as compared to general population, unemployment rate among Muslims is much higher, their share in salaries employment is much lower, they are mostly working as self employed in petty trade as rickshaw pullers, push cart traders and as labourers, most of their population falls in lower monthly expenditure bracket, their ownership of land is marginal, their access to education and higher education is wanting, malnutrition among them is rampant which coupled with lower affordability of medical facilities is resulting in their lesser*

longevity of life and above all even the benefits of governmental welfare programmes are not reaching them even to the share of their percentage in population." (pp 77,78)

" The commission also visited several districts and specifically visited Muslim inhabited areas. The visit and the interaction with the Muslim families revealed that most of the Muslims live below poverty line and eke out their livelihood by doing manual labour, unskilled labour, masons, rickshaw pullers, drivers, hawkers and cycle repairs and vulcanizing etc. A considerable section of the Muslims are found involved in traditional begging. Most of the women and children are engaged in beedi-rolling and their income is very meager. Most of them live in semi-pucca houses and temporary shelters and mostly in huts and tiled roofs. They do not have sufficient water supply and toilet and bathroom facilities in their houses and their living is mostly un-hygienic. During the visit of the commission, it was observed that most of the most of the Muslim children both boys and girls are engaged in Beedi rolling in view of meager income of the family and they do not attend the schools. The parents cannot afford to send their children to the schools since the children also have to earn for the family. Their level of education is far below and they do not get any chance to go out for higher studies due to poverty. The commission also took videographs and photographs on the living conditions of the Muslims. A job essentially involving physical labour is considered as manual work. Jobs such as cooks, waiter, maid servants, sweepers, cleaners, barbers, watchmen, gate keepers etc. are considered as manual work. During the visit of the commission, it revealed that most of the Muslims are engaged and depend on manual work." (pp 80, 81)

From the reasons and conclusions recorded by the Commission it is apparent that in the considered view of the Commission the higher unemployment rate; the lower share in salaried employment; predominant self-employment in petty trades and as rickshaw pullers, push-cart traders and labourers; the relatively lower monthly expenditure indicia; marginal land ownership, pervasive mal-nutrition coupled with restricted affordability of medical facilities and the consequent lower life expectancy; inaccessibility to Governmental welfare programmes are factors which determine the social backwardness of the Muslims. The other reasons given by the Commission are involvement of a significant section of the community in traditional begging; engagement of women and children in beedi-rolling with meager incomes; habitation in semi-permanent temporary shelters mostly in huts and tiled roofs; inadequate access to water supply, toilets and bath room facilities in houses and unhygienic living.

The Commission considered all the above factors to constitute sure and compulsive indicia of social backwardness. It must be recorded that for a number of the above conclusions on facts, there is neither data nor details of the survey, incorporated on record, on the basis of which the conclusions are arrived at. The finding of the Commission with regard to employment in petty trades such as rickshaw pullers, push-cart traders, labourers; with regard to mal-nutrition;

inadequate accessibility to medical facilities; lower life expectancy; involvement in trades such drivers, street-hawkers and in cycle repairing and vulcanizing; for the conclusion that a considerable section are involved in traditional begging or with regard to habitation, no specifics are recorded and the Commission recorded the conclusions on these aspects as *ipse-dixit*. These conclusions without supporting material cannot justify the Commission's conclusions. It of course, requires to be considered whether these factors considered by the Commission legitimately support the conclusion of social backwardness of the Muslims as a whole.

Justice Reddy's observations (***Mandal*** para 800) that " *indeed, there may be some groups or classes in whose case caste may not be relevant to all. For example, agricultural labourers, rickshaw-pullers/drivers, street-hawkers etc. may well qualify for being designated as Backward Classes*." appear to have persuaded the Commission to the conclusion that a significant percentage of low paid or menial employment in the Muslim aggregate is a legitimate indicia of the social backwardness of the entire religious collective.

In the comprehension of a long curial opinion as ***Mandal***, covering a complex range of issues concepts and nuances of legal and sociological thought, the distillate or ratio of the Court on any issue cannot safely be identified by reference to a single sentence or a random observation. The observations of the Court must be considered not only in their immediate context and setting but also as part of the continuum of an integrated thought process, of ratiocination leading conclusion(s). The entirety of the opinion must be considered, carefully and meticulously analyzed and as in the case of Statutes, recognized that one part throws light on the other, with the caution that the sentences and words in a judicial opinion are not crafted with the deliberation and precision with which Statutes are presumptively drafted. A judgment is essentially intended to convey and expound doctrinal positions and major articulate premises while applying them to the particular facts that fall for consideration. In the light of these principles governing the comprehension and application of judicial dicta, the observations in ***Mandal*** should also be understood.

Each of the majority judgments in ***Mandal*** (of Pandian,J, Sawant,J and Jeevan Reddy,J) unequivocally hold that social backwardness is the prime ingredient of backwardness in the Arts.15(4) & 16(4) context. Sawant,J after a searching analyses of several prior decisions of the Supreme Court including ***Chitralekha, Janki Prasad Parimoo V. State of J&K***[19] **(Parimoo), and *Vasanth Kumar*** concluded that economic backwardness on account of social and educational backwardness will alone legitimize identification as Backward Class for

the purposes of Art.16(4). The judgments of Desai, Chinappa Reddy and Venkataramiah, JJ in ***Vasanth Kumar*** emphasize and of Pandian and Jeevan Reddy,JJ in ***Mandal,*** permit but the singular conclusion that social backwardness in the constitutional context, based on occupation as the test, relates only to traditional occupations which are considered lowly. These occupations have a caste nexus in the Hindu collective and are carried on from one generation to the next and, therefore where the occupation as indicia of the caste has a low social recognition in the general population, it contributes to social backwardness. On conversion to other religions, having regard to the negative socio-cultural influence that the Hindu caste system has had on other religious collectivities as well, those converted to the other religions from the lower castes of the Hindus, suffer a lower level of esteem even amongst the members of the religious community to which they had converted. It is in these circumstances that the several judgments pointed out, a measure of castesim, factually though not formally, exists in other religions as well. Non-traditional occupations such as street-hawking, rickshaw-pulling or cycle repairing, vulcanizing and beedi-rolling are inadequate opportunity or poverty driven occupational choices. They are not inheritances of the social variety. Any person belonging to any community, caste or religious dispensation may be constrained to such arduous, menial or meager income-fetching occupations as an inescapable compulsion of livelihood pursuit. To characterize an entire community as backward including socially backward on the ground that some or a significant number of members of such community are variously rickshaw pullers, street-hawkers, beedi rollers, agricultural labourers, artisans, clause-IV employees in Government service or the like, is based on a misconception of the true constitutional principle a flawed psycho-sociological construct and a deviant application of the seminal postulates of Arts.15(4) and 16(4).

Poverty or economic want cuts across caste, religion, race, descent or gender barriers. It is idiosyncratic of an individual or family context and condition. Pavement and slum dwellers in the urban habitat, rickshaw pullers, street-hawkers, petty traders, beggars, rag pickers, garbage collectors and a host of other unfortunate people and those in other humble occupations as artisans, agricultural labour, in casual employment, in the organized or unorganized sector pursue the humble professions, occupations or trades on account of economic compulsions and not since these are traditional professions or calling nor because of the hereditary pressures of the social class to which they belong by birth. All such people including the inhabitants of Dharavi (Mumbai), and the various slums in

every metropolis and city, have no *inter se* caste, religion, race or gender commensality which informs their humble circumstance in life or the near animal existence of many of them. They are not Hindu, Muslim or Christian unfortunate. They are unfortunate and disadvantaged, simplicitor. Their misfortunes are caste and religion – neutral.

The Commission has neither found nor recorded that self-employment in petty business, occupations like rickshaw pulling, push-cart trade, agricultural labour, marginal land ownership, mal-nutrition, inaccessibility to medical facility, lower life expectancy, engagement as unskilled labour, masons or drivers, pursuit of professions or occupations such as cycle repairing or vulcanizing, engagement of women and children in beedi-rolling, are circumstances either peculiar to the Muslim community or that ***professing the faith of Islam*** (definition of 'Muslims' in Sec.2(c) of the Ordinance) and these (occupational, professional, extreme poverty and want) circumstances have a causal relationship. In the absence of a causal nexus between the Islam faith aggregate and the pursuit of certain professions, trades or humble economic circumstances; the occupation and/or the means test, provides neither a legal nor a rational and logical basis for the conclusion that all Muslims are socially backward because some or many of them are in dire economic straits.

If rickshaw pulling, street-hawking, beedi-rolling, being an artisan, living below the poverty line, manual labour, humble or unhygienic habitation, are events and circumstances not established to have a causal nexus with the pursuit of the Islamic faith and if these are not the established consequences of belonging to the Muslim community, these attributes of some or many in the Muslim community cannot justify the categorizing of the whole Muslim community as backward. Further, if such occupations, trades, callings, extreme economic circumstances and/or unhygienic habitation are legitimate indicia, not only of social backwardness but of clear contribution to the evolution or evidence of a distinct social class, all persons or families situate in like circumstances and subject to like deprivation of opportunities, regardless of the religion, race, caste, sex, descent, place of birth, residence or any such difference or distinction, would constitute a class in the Articles 15 and 16 context. In ***State of U.P. v Pradip Tandon*** ([20]) (***Pradip Tandon***) Ray CJ, opined:

> *" The expression 'classes of citizens' indicates a homogenous section of the people who are grouped together because of certain likenesses and common traits and who are identifiable by some common attributes. The homogeneity of the class of citizens is social and educational backwardness. Neither case nor religion nor place of birth will be the uniform element of common attributes to make them a class of citizens."*

Since rickshaw-pulling, street-hawking, petty vending or beedi-rolling by women and children, is neither known, recorded nor found by the Commission (with or without any data), to be either the occupational index or an index of the Muslim collective or a consequence of the profession of the faith of Islam, Muslims *en bloc* are not socially backward merely because a few or a substantial number of them pursue humble occupations, professions or callings, trades or businesses or are in strained economic circumstances.

In V.Narayana Rao and another Vs. State of A.P. and another([21]) (***Narayana Rao***) a Full Bench of this Court considered the validity of the orders of the Government of Andhra Pradesh, issued pursuant to the ***Muralidhara Rao Commission's*** recommendations. The Commission had concluded that none of the groups or classes among the Muslim or any other minorities could be included in the list of Backward Classes, except those already included namely 'Mehtar' and 'Dudekula'. Before the Full Bench (the judgment was delivered by B.P.Jeevan Reddy,J for the Full Bench, as his Lordship then was). It was *inter alia* contended that the Commission erred in recommending against the inclusion of the Muslims. The claim on behalf of the Muslims was that once certain professional groups, like barbers, washermen, fishermen, etc., among Hindus are included in backward classes, there is no reason why groups among Muslims following the said professions should not also have been included. It was also contended that there are a large number of rickshaw-pullers belonging to the Muslim community (in the city of Hyderabad) who are also socially and educationally backward but had not been recommended for inclusion. It was additionally contended that there are a certain number of 'Multanis' in two villages in Adilabad District who are in a state of extreme social and educational backwardness and the Commission failed to take care to look into them, investigate their conditions or to recommend their inclusion. Rejecting this contention, Justice Reddy held:

> " *Barbers, washermen and fishermen among Hindus constitute a homogeneous group a caste, which is also a class within the meaning of Art.15(4) the members whereof follow the particular profession generation after generation and as a matter of customary obligation; they constitute a homogeneous group identifiable by their profession, customs and practices. The same cannot be said of those following similar professions among Muslims. For that matter, any other Hindu belonging to forward classes may also choose to engage himself in any of the said professions but, for that reason he cannot be called a member of the homogeneous class of barbers, washermen, or fishermen, as the case may be. The link between the caste and profession does not recognize caste system at all, as pointed out by the* ***Mandal*** *Commission, through it may be that at the rural level, caste system has percolated to some extent into Muslims too. ..... So far as rickshaw-pullers in Hyderabad are concerned they are not confined to any*

one community."

*(**Narayana Rao** – para 33)*

Jeevan Reddy,J in fact had referred to the ***Narayana Rao*** decision, of course in the context of the permissible extent of reservations (***Mandal*** 807). In the same para and immediately after the above observations (in ***Narayana Rao***) Justice Reddy had observed that so far as rickshaw pullers in Hyderabad are concerned they are not confined to any one community and it may be that they are socially and educationally backward and require assistance. These observations in the context of the other observations of para-33 of ***Narayana Rao*** clearly indicate that what is observed by the Andhra Pradesh Full Bench is that if rickshaw pullers for instance could be and are considered as socially and educationally backward, all rickshaw pullers irrespective of the caste or religion to which they belong, would be entitled to be considered as socially and educationally backward since rickshaw pulling is not a customary occupation or profession of the Muslims or of any identifiable and certain, class or group amongst them.

On the analysis above we hold that the Commission had no basis, in concept or fact to support the conclusion that Muslims are socially backward. This conclusion of the Commission is the produce of a succession of fundamental misconceptions: that Muslims are a homogeneous collectivity; that humble occupations or trades, poverty and unhygienic habitation are specific (in some way) attributes of Muslims; and that these attributes constitute the Muslims a social class and a backward class. In the considered view of this court, each of these assumptions is erroneous. The Commission's conclusions based on a composition of erroneous assumptions, are therefore unsustainable.

Social backwardness is the primary ingredient of backwardness both in the Articles 15(4) and 16(4) context. There is thus no legitimate conceptual and factual basis, in the Commission's report, which entitles Muslims to affirmative State action under Arts. 15(4) and 16 (4), in particular since these provisions are exhaustive of the provisions for reservations that can be made in favour of backward class. [***Mandal*** paras 168, 243(1)&(2), 323(3), 383, 566(2), 743, 859(2)(b) and 860(1)]

Section 3 of the Ordinance declares the members of the Muslim community residing in the State to be a backward class. The declaration is exclusively based on the invalid conclusions and recommendations of the Commission. The declaration is accordingly invalid and unenforceable.

In the above background, the observations of Justice Jeevan Reddy (***Mandal*** para 800) must be considered as only illustrative of the categories of

occupations which may be considered by an appropriate Government or the permanent statutory (expert) body, for identifying as a Backward Class after applying the variety of tests spelt out in the majority opinions of ***Mandal*** including in the several paragraphs in the judgment of Justice Reddy. In any event even if the relevant sentence in para 800 of ***Mandal*** must be understood as enabling or legitimizing the identification of agricultural labourers, rickshaw pullers, street-hawkers as Backward Classes, all persons pursuing these occupations and situated in similar circumstances, without distinction on the basis of the religion to which they belong, comprise a social class and must be included and recognized as a backward class of citizens. Thus all agricultural labourers, rickshaw pullers/drivers, street-hawkers and the like may constitute one or more backward classes, wherever they are found, in which ever caste, community or religion, unless there is some further germane and rational material to conclude that a Muslim rickshaw-puller is more backward than say a Hindu rickshaw-puller, in which event rickshaw-pullers may further be categorized into different groups of Backward Classes with a view to enabling equal opportunity benefits rationally tailored to the degrees of backwardness. However, we are of the considered view that the observations of Justice Reddy in para 800 of ***Mandal*** must be understood in the light of the judgment as a whole as also the very pertinent principle spelt out by Sawant,J (***Mandal*** para 482) that the relevant backwardness, is one which is both the ***cause and the consequence*** of the criplling effect that disables participation in the educational and employment opportunities of the Republic.

In the light of the above analyses, we hold and conclude, in concurrence with the opinion of Justice Rao that the Commission has erroneously concluded that the Muslims are a Backward Class. This conclusion is based on no legal and rational basis and the conclusions as to educational and economic backwardness are also not supported by reliable or adequate data, which even probablize those conclusions.

Issue (d):

> (i) Whether in view of the definition of the expression "**Muslims**" (Section 2(c) of the Ordinance), the State legislative exercise *qua* the Ordinance is a fraud on the Constitution? and
>
> (ii) Whether the categorization of "**Muslims**" as Backward Classes is in substance and operation clearly and exclusively a religion specific Governmental reservations programme and the label of Backward Classes is only a camouflage to shield a clearly unconstitutional State action?

According to Sec.2(c) of the Ordinance any person professing the faith of Islam but excluding [for the purpose of the Ordinance – persons belonging to

Dudekula, Laddaf, Pinjari/Noorbash and Mehtar groups who are already included in the list of Backward Classes in the State) are defined as "Muslims". The exclusion of the specified groups amongst the Muslim community is only for and in the context of the Ordinance whereby the classification of those groups (in the Muslim community) as Backward Classes and their inclusion in groups "A"& "B" of the Backward Classes list of Andhra Pradesh is continued undisturbed, while grouping the rest of the "Muslim" community as category-"E". The Ordinance thus practically defines all persons (without exception) as Muslims who profess the faith of Islam. The exclusion of certain groups in the definition is only for the technical purposes of effectuating the schemata of reservation Groupwise i.e., A,B & E – insofar as members of the Muslim community residing in the State, is concerned.

Islam has no tradition, entrenched or in contemporary practice, prohibiting proselytization or conversion. Adventitious opportunities and advantages as are inherent in a reservation programme, for entry to academic pursuits, like professional and technical education, which have a limited intake and to public employment, provide a powerful incentive to conversion and proselytisation. By the Ordinance, professing the faith of Islam better enables educational and public employment opportunities. Any person professing faith in Islam (according to the definition), is a Mulsim though not a Laddaf etc. and is also a Backward Class, in view of the declaration in Section 3 of the Ordinance. Such a person would automatically be entitled to partake of the educational and public employment opportunities and benefits, in an entrenched and specially carved out quota of reservation under category-"E". Any member indisputably belonging to a forward class amongst Hindus or belonging to any other race, caste, descent or religion would become backward by the mere expedient of "***professing the faith of Islam".*** Never in the history of our Republic has membership of a Backward Class been so enticing, so easy or so inviting.

It is impermissible to acquire the status of a Backward Class either by marriage, conversion or adoption --- **Valsamma Paul Vs. Cochin University ([22]) (Valsamma Paul)** . It is however permissible, in view of the definition of ***Muslims*** in the Ordinance, to become a Muslim by *professing the faith of Islam* and thereby also becoming a member of a Backward Class and acquiring the benefits thereof. ***Professing the faith of Islam*** is not an expression defined in the Ordinance and there is no discernable or prescribed method of identifying the profession of a religious faith. The vagueness of the definition, the perverse results and clear constitutional transgression, are the inevitable consequence of the definition.

The Ordinance imposes illegitimate, discriminatory and grossly burdensome

impact on citizens, on those belonging to the existing notified Backward Classes and on those who are not members of backward classes, as well. The inference is therefore compelling that the entirety of the State action manifested in the provisions of the Ordinance, is a crude camouflage to shield what is clearly a naked and exclusively religion based programme of reservation in educational institutions and public employment. The declaration of Muslims as backward classes (Sec. 3) and as defined (Sec 2 (c)], is only on the basis of religion and discriminates against and negatively impacts members belonging to other religious persuasions only on the basis of religion. It is a religion exclusive classification. The provisions of the Ordinance, thus clearly transgress the prohibitions implicit in Art.14 and explicit in Art.15 (1) and 16 (2).

The distillate of the constitutional position as we discern is that Legislative or executive planning, with religion as the nucleus and basis, using affirmative action to ensure religious diversity in our social institutions – in education and in public employment, is to weave a preferred social fabric designed on a mosaic of religion and faith based representation. Such a State agenda has a disquieting resonance with the type of genetic engineering that the U.S Supreme Court had identified as invidious and had struck down, in **Skinner –V- Oklahoma** [316 U.S 535 (1942)].

For the aforementioned reasons, we hold the Ordinance, a fraud on power, unconstitutional and void *ab inito.*

Issue (e):

Whether the Ordinance is invalid for having facilitated reservations in excess of established constitutional limits?

In ***Mandal*** eight (8) of the nine(9) Judges constituting the coram, concluded [though in the context of Art.16(4)] that reservations cannot be made beyond 50%. The bases and ratio for this conclusion is the requirement of striking a balance between the constitutional guarantee of equality and Governmental compulsions of affirmative action to undo inequality through the medium of reservation. The ***Mandal*** decision identified that constitutional balance at 50%. Sustenance for the conclusions and identification of the constitutional balance was drawn not only from analyses of earlier precedents of that Court but also from the Debates in the Constituent Assembly. Since the guarantee of equality (before the law or the equal protection of the laws within the territory of India) is a core constitutional value that permeates the Constitution and is verbalized in Arts.14 to 16, the limit of 50% operates not only in relation to public employment opportunities but also other State aided or State regulated benefits, opportunities and largesse, including

educational opportunities that are controlled or regulated by the State.

Justice Reddy in ***Mandal*** while recording the "irresistible" conclusion that reservations should not exceed 50% (Mandal para 809), observed that while 50% should be the rule, certain extraordinary situations inherent in the great diversity of the country and the people might necessitate some relaxation of the strict rule. He illustrated that populations inhabiting far-flung and remote areas might on account of being out of the mainstream of National life and in view of the conditions peculiar to and characteristic to them, may deserve a different treatment or some relaxation of the 50% rule. The learned Judge however, clearly recorded that extreme caution should be exercised and a special case made out (for transgressing the normal and strict rule of 50%) (***Mandal*** para 810).

The illustration of an extraordinary situation referred to by Justice Reddy (***Mandal*** 810) was perhaps a reference to a fact situation that was considered by the Supreme Court earlier in ***Pradip Tandon***. In ***Pradip Tandon*** the Government of U.P. provided for reservation of seats in Medical Colleges in favour of people of rural areas, hill areas and Uttarakhand. The reservation policy was challenged and eventually came to be considered by the Supreme Court. The Supreme Court upheld the reservation policy only to the extent of people in the hill and Uttarakhand areas. The Supreme Court found that the people living in these areas of U.P. are socially and educationally backward classes of citizens; that high lands and hills offer an example of geographic and territorial insularity in terms of fiscal values and natural resources; the limited possibility for maintenance of human numbers, standards of living and property; the people of these areas are classes of citizens who do not make effective use of resources; there are large areas of land that maintain a sparse, disorderly and illiterate population of small or negligible property holding, no means of communication and technical processes and of neglected opportunities which themselves are very limited. Remote places, far removed from the ordinary habitat raise walls of social backwardness, educational backwardness is associated with reference to these factors; where people have traditional apathy for education on account of social and environmental conditions or occupational handicaps, educational backwardness results. The hill and Uttarakhand areas are inaccessible. There is lack of educational institutions and aids, observed Ray C.J in ***Pradip Tandon***. In so far as reservation in favour of rural people is concerned, the Court however held this fact of the reservation policy of the State to be unsustainable. The court observed that some people in rural areas may be educationally backward, some socially backward and there may be a few who are both socially and educationally backward, but it cannot be said that all citizens

residing in rural areas are socially and educationally backward. (***Pradip Tandon*** Para 25). The court further pointed out that 80% of the population in U.P. living in rural areas cannot be said to be a homogeneous class by itself. They are all not of the same kind; their occupations are different, standards are different, rights are different. Population cannot be a class by itself. The rural element does not make it a class and to suggest that rural areas are socially and educationally backward is to have reservation for the majority of the State. Reiterating the principle earlier enunciated in ***Parimoo***, the ***Pradip Tandon*** Supreme Court stated that if poverty is the exclusive test, a large population in our country would be socially and educationally backward class of citizens and a division between population of our country on the ground of poverty, that people in the urban areas are not poor and those in the rural areas are so, is neither supported by fact nor by a division between the urban and rural areas. There was no evidence to support the assumption of the State that all rural inhabitants are socially and educationally backward, was the conclusion in ***Pradip Tandon.***

In justification of its recommendations that 5% additional reservation be provided for Muslim community, the Commission recorded the following:

> *" Having regard to the fact that the total SC, ST & Backward Classes population percentage is exceeding 68 percent of the general population and further having regard to the fact that the existing Backward Classes have not attained levels of advancement warranting a revision of reservation of the existing reservations, the commission feels that in the extraordinary situation that is now prevalent in the State of Andhra Pradesh social reservations of 51 percent exceeding the ordinarily prescribed percentage by 1 point may be favourably considered by the Government."*

Though the Commission did not clearly spell out the extraordinary situation that is recorded to be prevalent in the State, its conclusion of "extraordinary situation" appears to be that the total population of existing reservation category i.e., SC, ST & Backward Classes in the State, exceeds 68%. In the considered view of this court such is not the type of extraordinary situation that was contemplated by the ***Mandal*** Supreme Court when the observations (para 810) were made. "Extraordinary situation" considered by the Commission is the population of the existing categories of Backward Classes (SC, ST & BC) in the State. This norm considered by the Commission negates the basic principles and law declared by the Supreme Court that reservations should not exceed 50 percent; a principle charecterised by the Supreme Court as "the rule" and "the strict rule". Except in cases of Scheduled Castes and Scheduled Tribes, reservations are not made in proportion to their population in the State. Proportional representation in the matter of reservations made in favour other

backward classes was the very issue and circumstance that fell for the consideration of the Supreme Court on successive occasions. In ***Mandal*** the identification of the constitutional balance in the aspect of the permissible percentage of reservations and the principle declared that reservations cannot be in excess of 50 percent, was in the very context of a claim that a larger percentage of reservations, in excess of 50 percent is necessary and compelling since the population of the categories identified as backward classes is very high ranging from 60 to 80 percent, in different States. Even so, the Supreme Court spelt out the rule to be 50 percent and a strict rule at that.

> The Commission recorded an *ipsi dixit* conclusion (extracted supra) that
> *"The existing Backward Classes have not attained levels of advancement warranting a revision of the existing reservations."*

Notwithstanding the observations in ***Vasanth Kumar*** and its reiteration in ***Mandal*** (para 847) that there should be a periodic revision of the list of OBCs and the provision in the 1983 Act for a revision of the existing list (of backward classes) every ten years, there has been no revision of the Backward Classes list of Andhra Pradesh since 1970 (G.O. Ms. No. 1793, dt 23.9.1970). In ***Mandal*** a direction was issued to specify the basis of exclusion (creamy layer), whether on the basis of income or extents of holdings or otherwise, and that on such specification persons falling within the net of the exclusionary rule shall cease to be members of the other Backward Classes. The Supreme Court also clarified that the Government of India's notification (the Office memoranda dated 13.8.1990 and 25.9.1991) should be implemented subject to the specification and exclusion of socially advanced persons from the Backward classes (ie., a creamy layer) and that after an expiry of four months (from the date of the judgment) the implementation of the office memoranda would be subject to the exclusion of the creamy layer. Despite the clearly discernable ratio that identification and exclusion of the creamy layer is the concomitant of the constitutional obligation of restricting affirmative action programmes including by way of reservation only in favour of Backward classes of citizens, no attempt was made either to identify or apply the creamy layer to the existing Backward classes list of the State. The declaration by the Commission that the existing Backward classes have not attained levels of advancement warranting revision of the existing reservation, is a declaration that is extravagant and wholly unfounded. The Commission did not review the existing list of Backward classes. In the circumstances its conclusion that the existing backward classes needs no revision, is a conclusion that is perverse and without a factual basis at all.

While the Commission recommended 5% of reservation to all Muslims including those distinct classes/groups of Muslims already included as Backward Classes (Laddaf, Dudekula etc), the Ordinance provided 5% reservation only in favour of Muslims excluding those already included in the list of Backward Classes. The existing Groups of Backward Classes A,B,C and D remain undisturbed.

In any event, the reservation in excess of 50 percent on the ground of the higher total population of the reserved classes is unsustainable as the population factor is not an "extraordinary situation" warranting relaxation of the strict rule spelt out in ***Mandal***. No "special case" has been made out for the deviation. The existing reservation for SC, ST & Backward Classes in the State (prior to the Ordinance) is 46 percent – 15% for SC, 6% for ST, 25% for BCs. By the Ordinance 5% reservation is provided for the Muslims. This takes the total reservation to 51 percent – in excess of the limit spelt out in ***Mandal***.

On the analysis and for the reasons above we hold that Sections 4 and 5 of the Ordinance providing for 5 percent reservation (of seats for admissions into educational institutions and in appointments of posts in Public services under the State, respectively) in favour of Muslims residing in the State, are invalid and are struck down.

For the reasons recorded by Justice Rao in the judgment, neither the *de minimus* principle nor the severance principle is applicable, as the legislative mandate in this area is clear and the impact is not minimal.

Extent of Judicial Review:

There is a residual aspect, which requires to be considered as briefly as may be.

It is contended on behalf of the State and the protagonists of the Ordinance, that this Court in judicial review does not sit in appeal over the expert analysis by the Commission or the subjective satisfaction of the State with regard to backwardness of Muslims; the need for providing affirmative assistance to them by way of reservations; or even in the matter of the percentage of reservations that should be made in their favour. All these areas are consecrated to the realm of the policy choices of the State and no interference is called for, is the submission.

Primarily there are three standards of review, which are apparent in constitutional law when the Court reviews the constitutionality of Governmental action. It chooses from among one of these three primary standards of review. These could be broadly classified as (a) the mere rationality standard; (b) the strict scrutiny standard; and (c) the intermediate-level review standard.

Mere rationality is the standard by which the court will uphold the governmental action so long as it meets the requirement of (a) a legitimate State objective i.e., the Government must be pursuing a legitimate Governmental objective from among broad categories such health, safety or general welfare of citizens and if so established the goal will be considered legitimate; and (b) rational relationship: i.e., there should a minimum rational nexus between the means chosen by the Government and the objective. Unless the Government has acted in an extremely arbitrary or irrational way, the rational link between the means and the ends would be satisfied.

In the ***Intermediate-level*** review standard, the Governmental objective should be an "important" objective and must be "substantially related", meaning thereby that the means chosen by the Government must be substantially related to an important Governmental objective. This is the standard that is midway between the ***Mere rationality*** standard and the highest standard, namely the ***Strict scrutiny*** standard.

The most rigorous standard of judicial review, the ***Strict scrutiny*** standard is satisfied only if the Governmental action satisfies two tough requirements (a) compelling objective; this means that the interest being pursued by the Government must be compelling, not just legitimate or even important and (b) least restrictive means; this requirement implies that the means chosen by the Government must be "necessary" to achieve that compelling objective. Thus the "fit" between the means and the ends must be extremely tight. It is not sufficient that there is a "rational relation" or "substantial relation". In operation and practice this requirement is met only by showing that there are no ***less restrictive*** means of accomplishing the compelling Governmental objective.

In the American Supreme Court's constitutional Jurisprudence, strict scrutiny standard has normally been applied in areas where the Governmental action impacts fundamental rights, where the State impairs the privacy cluster of rights such as marriage, child-bearing and use of contraceptives; to review claims that a classification violates equal protection guarantees, if the classification relates either to a fundamental right or a suspect classification like racial, national origin and the like; State action targeting content-based freedom of expression invites the strict scrutiny standard of judicial review as does State action directed against freedom of religion, either restrictive, impairing or substantially burdening the free exercise of religion.

A court's choice of the standard of review has two important consequences. (a) The burden of persuasion or of proof: The choice of the standard of review will

make a difference has to who owes the burden to establish the validity of the State action. In the ***strict scrutiny*** standard of review, it is the Governmental body whose action is being attacked that has the burden of persuading the court that its action is constitutional; and (b) the effect on the outcome: The choice of review standard has a significant effect on the actual outcome of the challenge. In a ***strict scrutiny*** review situation the Governmental action is normally struck down. It is for this reason that ***strict scrutiny*** standard is often characterized as "strict in theory, but fatal in fact". This is not invariably the result or the consequence, however. In a landmark 2003 decision involving the University of Michigan's affirmative action policies, the U.S. Supreme Court, in what is perceived to be one of the most important rulings on the issue, in a quarter of a century; decisively upheld the right of affirmative action in higher education. The University's undergraduate programme affirmative action policy came to be considered in ***Gratz V Bollinger*** and its law school affirmative action programme in ***Grutter V Bollinger(***[23] ***)*** (**Grutter).** I n **Grutter** (2003) the Supreme Court did apply the ***strict scrutiny*** standard but nevertheless upheld the Michigan 's law school admission policy that sought to achieve student body diversity. The policy required admissions officials to evaluate each applicant (to the law school) based on information available in the file, including a personal statement, letters of recommendation, as essay describing how the applicant will attribute to law school life and diversity; the applicant's undergraduate GPA and law school admissions test (LSAT) score. The officials must also look beyond grades and scores to " softer variables such as the enthusiasm of the applicant, the quality of the undergraduate institution and other parameters. The policy did not define diversity solely in terms of racial and ethnic status nor did it restrict the types of diversity contributions eligible for "sufficient weight" but affirmed the law schools' demand to diversity with special reference to the inclusion of African-American, Hispanic and Native-American students, who otherwise might not be read in the student body in meaningful numbers. The policy sought to ensure their ability to contribute to the law schools character and to the legal profession. *Grutter* a white Michigan resident was denied admission whereupon she litigated. Dealing with the strict scrutiny standard of review, ***Sandra Day O'Connor,J*** speaking for the majority observed that whenever Government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the constitution's guarantee of equal protection. When race-based action is necessary to further a compelling Governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the

narrow-tailoring requirement is satisfied. Justice O'Connor emphasized that all Governmental action based on race-based classification long recognized as in most circumstances irrelevant and, therefore prohibited--should be subject to a detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed. Review standard of strict scrutiny earlier re-employment in ***Adarand Consructors Inc V Pena*** ***([24])*** was reaffirmed in ***Grutter.*** Spelling out the reasons for employing the strict scrutiny standard of review, Judge O'Connor stated: " *we are a free people whose institutions are founded upon the doctrine of equality. ------ it follows from that principle that a Government may treat people differently because of their race only for the most compelling reasons.--------- all rational classifications imposed by Government must be analyzed by a reviewing Court under strict scrutiny.------- such classifications are constitutional only if they are narrowly tailored to further compelling Governmental interest.-----* ***absent searching judicial inquiry into the justification for such race-based measures, we have no way to determine what classifications are benign or remedial and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.--- we apply strict scrutiny to all racial classifications to "smoke out" illegitimate uses of race by assuring that Government is pursuing a goal important enough to warrant the use of a highly suspect tool****." (emphasis added)*

After ***Metro broadcasting***, there have been several decisions by U.S. Supreme Court invariably applying the strict scrutiny standard of judicial review to racial classifications, and without exception. ***Adarand Consructors Inc II Vs. Norman Y.Mineta*** [534 US 103(2001)]**,** ***Grutter*** and then **Garrison S Johnson Vs. California (**unreported 2005) exemplify the invariable application by the U.S. Supreme Court of the strict scrutiny standard of judicial review to suspect State classifications particularly race- specific classifications. As Judge O'Connor pointed out in **Grutter,** without a searching judicial inquiry into the justification of race-based measures, there is no way to determine which classifications are benign or remedial and which motivated by illegitimate notions of racial inferiority or simple racial politics, and we wish to add, competitive populism too.

I n ***Mandal***, after tracing the meandering course of review standard applications by the U.S. Supreme Court, from ***DeFunis V Charles Odegaard([25])*** t o ***Metro Broadcasting Inc V Federal Communications Commission([26])*** , Reddy, J observed that no single, uniform pattern of thought

can be discerned from these decisions and the ideas appear to be still in the process of evolution .(***Mandal*** para 732). Dealing with the question as to the extent of judicial review in issues of identification of Backward Classes, and the percentage of reservations made for such classes, Reddy,J observed that there is no particular or special standard of judicial scrutiny in matters arising under Articles 15(4) & 16(4). "*The extent and scope of judicial scrutiny depends upon the nature of the subject-matter, the nature of the right affected, the character of the legal and constitutional provisions applicable and so on. The acts and orders of the State made under Article 16(4) do not enjoy any particular kind of immunity. At the same time, we must say that court would normally extend due deference to the judgment and discretion of the executive – a co-equal wing – in these matters. The political executive, drawn as it is from the people and representing as it does the majority will of the people, is presumed to know the conditions and the needs of the people and hence its judgment in matters within its judgment and discretion will be entitled to due weight. More than this, it is neither possible nor desirable to say. It is not necessary to answer the question as framed*." (***Mandal*** para 842)

In ***Mandal,*** Pandian J considered whether the policy of the Government could be subject to judicial review. Referring to a catena of Supreme Court authority on the extent of judicial review of the policy choices of Government, the learned Judge concluded that the action of the Government making a provision for reservation of appointments or posts in favour of any Backward Class of citizens is a matter of policy of the Government; what is best for the Backward Classes and in what manner the policy should be formulated and implemented bearing in mind the object to be achieved by such reservations is a matter for decision exclusively within the province of the Government and such matters do not ordinarily attract the power of judicial review, except on settled grounds(perversity and the like). (***Mandal*** para 176)

Sawant, J reiterated the decision adopted by Jeevan Reddy,J and concluded that there are no special principles of judicial review nor does the scope of judicial review expand when the identification of Backward Class and the percentage of reservations kept for them is called in question. So long as the correct criterion for the identification of Backward Class is applied, the result arrived at cannot be questioned on the ground that other valid criteria were also available for such identification. The result arrived at even if marginally defective would not violate the exercise; No method is perfect when sociological findings are in issue, he held. The learned Judge, however emphasized that when the criterion applied for identifying Backward Class is either perverse or *per se* defective or unrelated to

such identification, in that it is not calculated to give the result or is calculated to give, by the very nature of the criterion, a contrary or unintended result, the criterion is open for judicial examination. (***Mandal*** paras 529,530)

Thommen, held that it is the State which has to form an opinion whether the conditions postulated for reservations are satisfied, however the satisfaction on the basis of which an opinion is formed by the State must be rationally supported by objective criteria; considering all relevant matters and eschewing all irrelevant matters; after a proper assessment of the competing claims of classes of citizens; should evaluate relative backwardness before the conclusion that particular classes of citizens are so backward and so inadequately represented in the public services as to be worthy of special protection by means of reservation. He held that State action whether legislative or executive is open to challenge if in conflict with the Constitution, the governing Act or the general principles of the land or is so arbitrary and unreasonable that no fair-minded authority would ever have made it. (***Mandal*** paras 286).

Sahai,J after a brief survey of the standards of judicial review and scrutiny applied to test suspect classifications by the U.S. decisions, held that though the State has substantial latitude in determination of either backwardness or the inadequacy of representation, if the principles for identification are invalid, the classification violates constitutional limits, if the analyses is illegal and invalid or the policy is adopted for extraneous considerations, the Court could apply the corrective. The learned Judge held the legality (of an affirmative action programme of the State) must be weighed alongside the guaranteed rights to citizens and the Court may "smoke out" any illegitimate use or transgression of the constitutional limits (***Mandal*** paras 558 to 560).

From an analyses of the several opinions in ***Mandal,*** as to the appropriate standards of judicial review in matters pertaining to affirmative action, it appears to us that the area is broadly left open. What is clear however is that the extent and level of scrutiny is relative to the legal or constitutional right and interest involved in a specific claim, presented before the Court.

When a reservation policy of the State is challenged, several issues fall for consideration. These are;

(a) The constitutional limits within which State action may be pursued, such as the explicit or clearly implied constitutional prohibitions as to classificatory parameters;

(b) The relevance or rationality of the criteria adopted by the State or an expert body accredited by the State to perform the exercise (of backward class identification).

(c) The adequacy (in legal terms) of the data considered in the exercise;

(d) The rationality of the synthesis between the evolved criteria and the collected data, for analysis; and

(e) The rationality of the conclusions arrived at by the expert body and the decision of the State.

In our considered view, identification of an appropriate standard of review, relevant to the examination of the several steps and aspects involved in the State exercise of declaration of a Backward Class, lends clarity to the task of judicial review and advances coherence and consistency to litigative outcomes.

When a reservation programme of the State is challenged as incompatible with the clear prohibitions and inconsistent with the rights guaranteed by the Constitution, the reviewing Court must perhaps apply the standard of a strict and exacting scrutiny of the State action.

Under our constitutional scheme explicit and dominantly religion or caste-based classification is prohibited. Therefore, an explicit religion-specific classification of our plural and composite social fabric, to identify a class of citizens for extending to them "set aside" benefits for educational and public employment opportunities, would constitute a suspect classification. Such classifications must be subjected to the most exacting judicial examination and the State must establish that though its policy is facially region-explicit, is in reality a benign programme within constitutional limits. The several decisions of the Supreme Court since ***Champakam Dorairajan,*** in particular, ***Balaji, State of A.P. V. P.Sagar ([27])(Sagar), Peeriakaruppan, Balram, Parimoo, Pradeep Tandon and Mandal*** illustrate a consistent practice of exacting scrutiny by our Apex Court, when a challenge to a reservation programme is presented on the ground that the classification underlying the identification of Backward Classes is incompatible with constitutional norms. ***Mandal*** itself emphatically illustrates the application of the rigorous scrutiny standard by the Supreme Court. The report of the **Mandal Commission** was examined in ***Mandal*** in exhaustive and clinical detail with regard to the social, educational and economic indicators evolved, the sample-size of the collected data, the analyses and the conclusions of the **Mandal Commission.**

From the preponderance of the

practice of the rigorous scrutiny standard by the Supreme Court, it could perhaps be inferred that this standard of judicial review has come to represent the normative standard, if not an enunciated legal principle of the appropriate standard of judicial review.

It has been suggested by some of the writ petitioners that the impugned State action is a thinly disguised programme of social engineering, not for any constitutional or legitimate State affirmative goals but in venal response to the demands of competitive populism for transient electoral gains. They contend that the political processes of the State, having exploited the extant insularities of our civil society to saturation, are engendering further divisions in pursuit of the Holy Grail of a perfect electoral constituency and the impugned exercise is for the purpose. We decline the petitioners' invitation to speculate upon the motives of the State action. They have no legal relevance. What we are considering is a legislative instrument-an Ordinance.

Before parting we place on record, our appreciation of the considerable industry, erudition and scholarship with which the several shades and nuances of the complex issues involved were presented for consideration of this Court, by the several counsel.

CONCLUSIONS

(a) The determination by the A.P. Commission for Backward Classes, that all Muslims residing in the State of Andhra Pradesh are Backward Class of citizens, is unsustainable, invalid and is so declared;

(b) There is no basis for the conclusion by the Commission that the ***existing Backward Classes have not attained levels of advancement warranting a revision of the existing reservations.*** This conclusion is based on no reference, no evidence, is perverse, invalid and is accordingly declared;

(c) The recommendation by the Commission that *in the extraordinary situation that is now prevalent in the State of Andhra Pradesh social reservations of 51 percent exceeding the ordinarily prescribed percentage by 1 point* (must be considered by the

Government) is unsustainable. No extraordinary situation is established and no special case made out for deviation from the strict rule of 50% mandated by ***Mandal;***

(d) Sections 2(c), 3, 4 & 5 of the A.P. Reservation of seats in the Educational Institutions and of appointments or posts in the Public Services under the State to Muslim Community Ordinance, 2005 (A.P. Ordinance No.13 of 2005), are unconstitutional(being *ultra vires* and violative of fundamental rights under Articles 14,15(1),15(4),16(2) and 16(4) of the Constitution). Consequent on this declaration, other provisions of the Ordinance are inoperable. The Ordinance in its entirety is therefore declared unconstitutional and inoperable.

The writ petitions are accordingly allowed. There shall be no order as to costs.

COMMON ORDER

[Per HON'BLE SRI. JUSTICE VVS.RAO]

PART I

PROLOGUE

Affirmative State Action, as strategy for compensating injustice suffered by socio economic and political discrimination, is a constitutional promise, which has to be redeemed as long as Indian Society suffers from collective inefficiency and lethargy in removing social disparities based on caste, region, religion and poverty. One can never say so soon that the constitutional pledge "to secure to all citizens equality of status and opportunity", is redeemed, for "what is left undone one minute is restored by no eternity"[28]. This is Indian Constitutional axiom. A score and a half decisions of Supreme Court of India during 1950-2004 and equal number of opinions by various Indian High Courts support the view. A lot is considered and said by the judicial wing of the State, but more often than not, the other two wings of the State do not completely understand and therefore we must "always begin again" while scrutinizing the affirmative policy targeted at a specified religious class of citizens.

We shall, of course, begin afresh. We are, however, aware that in sands of time we are trekking the path taken by Judges of the Supreme Court. We are not oblivious of the fact that the slate to scribe on is not totally empty, because "equality" is such a legal and jurisprudential principle which like Sun in the Universe contains enormous energy which can re-energise other constitutional principles perennially. Whatever be the scope of the subject, the judicial consideration shall be restricted to the arguments and counter arguments on the issues, though reasons for acceptance or rejection might travel beyond case presentation by the Bar. It is, here, apt to quote Justice Benjamin N.Cardozo from the immortal lecture to Law students of Yale University in 1920[29].

We look beyond the particular to the universal, and shape our judgment in obedience to the fundamental interest of society

> **that contracts shall be fulfilled. There is a wide gap between the use of the individual sentiment of justice as a substitute for law, and its use as one of the tests and touchstones in construing or extending law.** I think the tone and temper in which the modern judge should set about his task are well expressed in the first article of the Swiss Civil Code of 1907, an article around which there has grown up a large body of juristic commentary. "The statute," says the Swiss Code, "governs all matters within the letter or the spirit of any of its mandates. In default of an applicable statute, the judge is to pronounce judgment according to the customary law, and in default of a custom according to the rules which he would establish if he were to assume the part of a legislator. He is to draw his inspiration, however, from the solutions consecrated by the doctrine of the learned and the jurisprudence of the courts – par la doctrine et la jurisprudence." There, in the final precept, is the gist of the difference between "le phenomene Magnaud," and justice according to law. **The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains.**
>
> (emphasis supplied)

Equality is a dynamic concept. It does not mean absolute equality disregarding inherent differential characteristics of men and material. Such a situation permits a different treatment by criterion provided it is reasonable. Different treatment is perpetually intended not benefiting men and material differently but as an equalizing principle. This has been explained in a recent judgment of the Supreme Court of India in **Islamic Academy of Education v State of Karnataka**[30] (for short, **Islamic Academy**), Justice S.B.Sinha in his separate Judgment made the following observations, which are apposite in this Prologue:

> Human history would show that struggle of man for democratic polity was inspired by a desire to achieve equality among them. Indeed, some of the world Constitutions in their preamble abhor inequality and proclaim to achieve equality in all respects. **Whatever may be the power and jurisdiction of the State and State authorities to make a special provision in favour of backward and downtrodden, when the Court tests the reasonableness of such distinctive State action, it should be done by posing a question whether such State action to ameliorate social, economic and political poverty; whatever be the reason, delays the journey towards proclaimed goal of equality. If a measure tends to perpetuate inequality and makes the goal of equality a mirage, such measure should not receive the approval of the Court. The Court, in such circumstances, has to mould the relief by indicating what would be the reasonable measure or action which furthers the object of achieving equality.** The concept of equality is not a doctrinaire approach. It is a binding thread which runs through the entire constitutional text. An affirmative action may, therefore, be constitutionally valid by reason of Articles 15(4) and 16(4) and various

directive principles of State policy, **but the Court cannot ignore the constitutional morality which embraces in itself the doctrine of equality. It would be constitutionally immoral to perpetuate inequality among majority people of the country in the guise of protecting the constitutional rights of minorities and constitutional rights of backward and downtrodden.** All the rights of these groups are part of right to social development which cannot render national interest and public interest subservient to right of an individual or right of community. ... In the event the minorities are not granted the right to establish educational institutions of their choice and admit students of their community, the right of equality would lose all its purpose and relevance. It is in that sense the rights of the majority and minority must be held to be equal. In my opinion the provisions of Articles 19(1)(g), 29(2) and 30 must be so construed.

(emphasis supplied)

PART II

INTRODUCTION

The Governor of Andhra Pradesh promulgated an Ordinance under Article 213 of Constitution of India, called 'Andhra Pradesh Reservation of seats in the Educational Institutions and of appointments or posts in the Public Services under the State to Muslim Community Ordinance, 2005' (A.P.Ordinance No.13 of 2005, which is referred to as the Ordinance in this Judgment). The Ordinance declares members of Muslim Community in State of Andhra Pradesh as Backward Class and further mandates Muslims to be included in the list of Backward Classes prepared by Government of Andhra Pradesh from time to time. It provides reservation of 5 per cent of seats for admission in educational institutions and 5 per cent in appointments in public services for Muslims. In this batch of writ petitions, the constitutional vires of the Ordinance is challenged.

The title of the Ordinance, namely, **A.P. Reservation of Seats in the Educational Institutions and of appointments or posts in the Public Services under the State to Muslim Community Ordinance, 2005**, makes abundantly clear that it is a legislative instrument intended to provide to constitutional concessions like reservations to a religious community which happens to be a minority community in the State of Andhra Pradesh. This is made further clear by the long title of Ordinance, its unusually long preamble as well as its provisions. Therefore, we need to read the preamble as well as the provisions of the Act.

> An Ordinance to provide Reservation to Muslim Community in the matters of Admission into Educational Institutions and Appointments to Public Services in the State of Andhra Pradesh and for matters connected therewith or incidental thereto.
>
> Whereas, the Government provided 5% reservation to Muslims in the State in educational institutions and employment in the state vide GO Ms.No.33, Backward Classes Welfare Department dt.12.7.2004.
>
> And whereas, the above orders were challenged in the Andhra Pradesh High Court.

And whereas, Larger Bench of the Andhra Pradesh High Court in its judgment in WP No.12239/2004 etc., dt.21.9.2004 held that the above orders are ultra vires *inter alia* on the ground that the State Government is bound to consult the Andhra Pradesh Backward Classes Commission before undertaking any revision of the Backward Classes List and they do not reflect formation of opinion as to adequacy of representation of Muslim Community in the service of the State and directed the Government to reconstitute the Andhra Pradesh Commission for Backward Classes to examine the matter;

And whereas, the Hon'ble High Court of Andhra Pradesh observed that the Muslims as a group are entitled to affirmative action/social reservations within the constitutional dispensation, provided they are identified as a socially and educationally backward class for the purpose of Article 15(4) and Backward Class of citizens for the purpose of Article 16(4) of the Constitution of India and providing social reservation to the Muslim Community or selections or groups among them in no manner militate against secularism which is a part of the basic structure of the Constitution;

And whereas, the High Court held that the creamy layer among the Muslim community are not entitled to the benefits of social reservation;

And whereas the Andhra Pradesh Commission for Backward Classes found that the entire Muslim Community is socially, educationally and economically backward and therefore steps shall be taken for providing reservation to the members of the Muslim Community for improving their social, educational and economic conditions;

And whereas, the said commission held that Muslims are not adequately represented in State employment;

And whereas, the Commission further recommended that provision be made for providing 5% reservation to Muslim Community in all educational institutions and public services in the State.

And whereas, the existing reservation provided to the Scheduled Castes and Scheduled Tribes and Backward classes is at 46%.

And whereas, the Supreme Court in Indra Sawhney Vs. Union of India in WP (C) No.97/1991 dated 16.11.1992 held that reservation under clause (4) of Article 16 of the Constitution of India shall not exceed 50% of the appointments or posts barring certain extraordinary situations;

And whereas, the commission also considered that the percentage of population of Scheduled Castes, Scheduled Tribes and Backward Classes in the state is exceeding 68% of the total population and the Muslim population in the State of Andhra Pradesh is 9.2% of total population and further having regard to the fact that the existing Backward Classes have not attained the levels of advancement warranting a revision of existing reservations and felt that in the extraordinary situation prevalent in the State providing total reservations of 51% may be considered by the Government.

And whereas, the Backward Classes Commission also recommended that the creamy layer from among the Muslim community would however have to be excluded from the benefits of recommended reservation by adopting the criteria laid down by the Government of India.

And whereas Article 46 of the Constitution of India provides that the State shall promote with special care the educational and economic interest of the weaker sections of the people;

And whereas, the Backward Classes population in the State

comes to more than 77% of total population and therefore, a further reservation of 5% in favour of Muslim community in addition to existing 46% of social reservation is considered to be just and reasonable;

And whereas, the State Government accepted the recommendations of the Andhra Pradesh Commission for Backward Classes to provide 5% reservation to the Muslim Community for admission into the seats in educational institutions in the State and employment in the public services in the State of Andhra Pradesh and to exclude the creamy layer from the benefit of reservation;

And whereas, the Legislative Assembly of the State is not now in session and the Governor of Andhra Pradesh is satisfied that circumstances exist which render it necessary for him to take immediate action.

Now, therefore, in exercise of the powers conferred by clause (1) of Article 213 of the Constitution of India, the Governor hereby promulgates the following Ordinance…

1. (1) This Ordinance may be called the Andhra Pradesh Reservation of seats in the Educational Institutions and of appointments or posts in the Public Services under the State to Muslim Community Ordinance, 2005.

(2) It extends to the whole of the State of Andhra Pradesh.

(3) It shall come into force at once.

2. In this Ordinance unless the context otherwise requires-

(a) “Educational Institutions” means a college, a school imparting education upto and inclusive of tenth class or other institution by whatever name called, whether managed by Government, private body, local authority or university and carrying on the activity of imparting education therein, whether technical, professional including medical or otherwise, and includes a Polytechnic, Industrial Training Institute and Teachers’ Training Institute.

(b) “Government” means State Government of Andhra Pradesh.

(c) “Muslims” means any person professing the faith of Islam but does not include for the purpose of this Ordinance, persons belonging to Dudekula, Laddaf, Pinjari/Noorbash and Mehtar groups who are already included in the lists of Backward Classes in the State.

(d) “Notification” means a notification published in Andhra Pradesh Gazette and the word “Notified” shall be construed accordingly.

(e) “Public Service” means public service as defined in Andhra Pradesh (Regulation of Appointments to Public Seravices and Rationalisation of Staff Pattern and Pay Structure) Act, 1994.

3. Having regard to the social, educational and economic backwardness, the members of the Muslim community residing in the State are hereby declared as Backward Classes and be included in the lists of Backward Classes prepared by the Government from time to time.

4. Notwithstanding anything in any other law for the time being in force, there shall be reservation of five percent of seats for admission into educational institutions in favour of Muslims residing in the State.

Provided that the members belonging to the creamy layer amongst Muslim community shall not be entitled to such reservation.

5. Notwithstanding anything in any other law for the time being in force, there shall be reservation of five percent in appointments or posts in Public Services under the State in favour of Muslims residing in the State.

Provided that the members belonging to the creamy layer among Muslim community shall not be entitled to such reservation.

Explanation: For the purpose of this Ordinance the creamy layer shall be such as may be determined by the State Government and till such determination takes place, the guidelines issued by the Government of India from time to time shall be followed.

6. The Government, may, by notification make provision for carrying out all or any of the purposes of this Ordinance.

7. If any difficulty arises in giving effect to the provisions of this Ordinance, the Government may make such order not inconsistent with the provisions of the Ordinance as may appear to them to be necessary or expedient for the purpose of removing such difficulty.

Provided that no such orders shall be issued after expiry of two years from the date of commencement of this Ordinance.

An analysis of the provisions of the Act would reveal that it contains a declaration and a mandate. The declaration in first part of Section 3 is to the effect that the members of Muslim community in the State of Andhra Pradesh are backward classes. The second part of Section 3 read with Sections 4 and 5 contain the legislative fiat, to the effect that Muslim community be included in the lists of backward classes prepared by the Government from time to time and as per Section 4 reservation of five per cent of seats for admission into educational institutions is provided in favour of Muslims residing in the State. Likewise Section 5 stipulates that reservation of five per cent in appointments or posts in public services shall be made in favour of Muslims residing in the State. Even the long title of the Ordinance makes it clear that the purpose of the impugned Ordinance is to make reservations for Muslims in the State of Andhra Pradesh. The Ordinance is intended to classify Muslims – a religious group; as backward classes for the purpose of reservation of five per cent of seats in educational institutions and five per cent in appointments. If Section 3 of the Ordinance – assuming it to be so; is not included in the Ordinance, without anything more, *ex facie* the impugned Ordinance would not stand in the face of Articles 14, 15(1) and 16(2) of Constitution of India. The State is therefore bound to demonstrate before us that the impugned Ordinance is intended to provide five per cent reservation in educational and public employment to a separate backward class of citizens, which incidentally happened to be Muslim community, and that reservation is not *per se* religious classification. A reading of the long title, the preamble and provisions of the Ordinance, we may reiterate, would show that in pith and substance, it is intended to provide reservation of seats in educational institutions and appointments to Muslim community.

In the light of the rival submissions and having regard to the history of Muslim reservations and background facts, we considered various

issues/questions by grouping them in appropriate manner. We may indicate that this Judgment is, for the sake of convenience – is divided into nine parts. Part I, II and III contain a Prologue, Introduction and the Issues for consideration. Part IV briefly points out the history of Muslim reservations and background of this matter. In part V, we deal with issues under Articles 15(4) and 16(4) of Constitution of India including the question whether Muslims can be backward class in constitutional scheme. Part VI deals with the issue under Articles 15(1) and 16(2) of Constitution of India. The case also has thrown up an argument under Article 14 in ways more than one. This aspect of the matter and other issues are in part VII with the heading "Issue under Article 14 and other points". In part VIII, we give brief summary of our conclusions and result of petitions and in part IX we part with the judgment with an epilogue.

PART III

ISSUES FOR CONSIDERATION

We have heard elaborate submissions for over a period of three weeks on ten days. M/s.K.Ramakrishna Reddy, D.Prakash Reddy and Ravi Varma Kumar, Senior Advocates led the petitioners. M/s.T.Surya Karan Reddy, D.V.Sita Rama Murthy, and L.Ravichander added to lead arguments. The learned Advocate General for the State, Mr.C.V.Mohan Reddy, is lead counsel on behalf of the State and other respondents. M/s.Rajeev Dhavan, S.Ramachandra Rao, S.S.Prasad and Ghulam Yazdani, Senior Advocates; and E.Ayyapu Reddy, Noushad Ali, S.Niranjan Reddy, K.Ramakanth Reddy, A.Satya Prasad, K.Balagopal, K.G.K.Prasad and Basith Ali Yavar appeared for interveners placing their clients' perception on sustainability of the impugned Ordinance. We are beholden for the effort of the counsel in presenting the complex legal issues with good effort, which enabled us to think, re-think before taking up the analytical exercise to churn out Court's conclusions.

Deviating from the practice of summing up of rival submissions at the threshold, we propose to briefly refer to the submissions contextually as and when we take up each issue. We may here briefly indicate broad submissions against the Ordinance. The petitioners argue that impugned Ordinance is contrary to the dicta laid down by the Supreme Court in **Indra Sawhney-I v Union of India**[31] (for short, **Indra Sawhney-I**). It does not stand the tests of Articles 15(4) and 16(4) of Constitution of India and impinges upon the fundamental rights of the citizens under Articles 14,15(1) and 16(2) of Constitution of India. The Backward Classes Commission report is not sound and the findings recorded therein are *per s e* perverse, irrational and unreasonable. By impugned Ordinance, total reservation exceeds fifty per cent, which is constitutionally impermissible.

The State, other respondents and many interveners support the Ordinance. They argue it that Muslim community as a whole can be treated as a backward class as it is permissible under the Constitution. The B.C.Commission has correctly exercised its powers in collecting, collating and analyzing the sample data before arriving at the conclusion regarding social backwardness of Muslim community. Such a conclusion is ordinarily not reviewable by the Court. Extensive Judicial review by this Court cannot be extended to the areas which are

traditionally prohibited by long settled principles in the field of administrative law. The State exercised its powers in accordance with the provisions of A.P.Commission for Backward Classes Act, 1993 (hereafter, B.C.Commission Act, for brevity). Even if the reservation exceeds Rule of fifty per cent, the same does not suffer from vice of Articles 14, 15 and 16 of Constitution of India as there are extraordinary circumstances warranting such excess. These are the broad submissions by the State and others.

PART IV

HISTORY OF MUSLIM RESERVATIONS AND BACKGROUND FACTS

The State of Andhra Pradesh made attempts in the past to treat Muslim community as a backward class for the purpose of Articles 15(4) and 16(4) of Constitution of India. This Court, however, did not approve the decision of the State. Earlier two Backward Classes Commissions considered the question but ultimately rejected the claim of entire community while recommending the inclusion of only a few occupational groups or sub-sects in Muslim community in the list of backward classes for the purpose of reservations. Such State action received the approval of this Court. This Court impliedly rejected the plea to include entire Muslim community in the list of backward classes. This position can be gathered by reference to the history of reservations in the State of Andhra Pradesh. For this purpose, we have drawn from reports of two earlier Commissions, three Full Bench decisions of this Court and pleadings in the cases before us.

By the time of formation of State of Andhra on 01.10.1953 with Capital at Kurnool, there were certain reservations to backward classes in educational institutions or services. This policy continued even after formation of the State of Andhra Pradesh on 01.11.1956. In the list of backward classes there were 146 communities in all. Muslim community or any of its groups were not included in the list. In 1963, the Government of Andhra Pradesh issued orders in G.O.Ms.No.1886 dated 21.06.1963 making reservations of seats in Government Medical colleges. This was challenged before this Court in **Sukhdev v Government of Andhra Pradesh**[32] (for short, **Sukhdev**). A learned single Judge of this Court, P.Jaganmohan Reddy,J (as His Lordship then was) struck down the said Government Order as impinging upon Articles 15 and 29(2) of Constitution of India. The learned Judge came to the conclusion that the identification of backward classes was based solely on the castes and that the same goes against the ratio in **M.R.Balaji v State of Mysore**[33] (for short, **Balaji**).

The Government of Andhra Pradesh then decided to apply economic criteria alone for determining backwardness. Accordingly orders were issued in G.O.Ms.No.301, Education Department, dated 03.02.1964 scrapping the lists of backward classes with effect from 01.04.1964 and further ordering to give financial assistance to economically poorer sections having annual income of less than Rs.1,500/-. The Government also appointed a Cabinet Sub Committee to draw up the list. The Sub Committee adopted poverty; low standard of education; low standard of living; place of habitation; inferiority of occupation; and caste as criteria

for determining backwardness, based on which the Director of Social Welfare drew up the list. This list was recommended by the Cabinet Sub Committee, which was accepted by the Council of Ministers for inclusion of 112 communities in the list of backward classes. Accordingly, G.O.Ms.No.1880 Education Department, dated 29.07.1966 was issued for the purpose of conferring concessions like scholarships, admission in professional colleges and reservation of posts in public services. This Government Order was challenged before a Division Bench of this Court in **P.Sagar v State of Andhra Pradesh**[34]**.** The Division Bench of this Court, comprising Jaganmohan Reddy and Venkatesam,JJ (as they then were) invalidated G.O.Ms.No.1880 dated 29.07.1966. The State's appeal being **State of A.P., v Sagar**[35] (for short, **Sagar**) before the Supreme Court was dismissed confirming the Division Bench Judgment of this Court.

After the Supreme Court Judgment in **Sagar** (supra), the Government appointed A.P.Backward Classes Commission, initially under Chairmanship of Manohar Pershad,J, retired Chief Justice of this Court, later (after his resignation) with K.N.Anantaraman, Retired Chief Secretary to Government of A.P., as Chairman. The terms of reference of the Commission included to determine the criteria to be adopted in considering social and educational backwardness of classes of citizens and then prepare a list of such backward classes setting out their proximate numbers and their territorial distribution. The Commission was also required to advise Government about classes of citizens which are not adequately represented in Public Services and prepare list of all such classes for reservation of appointments or posts. The Backward Classes Commission under the Chairmanship of K.N.Anantaraman (hereinafter referred to as Anantaraman Commission or Anantaraman Report) conducted detailed investigations and enquiries.

Anantaraman Commission called for particulars from Heads of Government Departments about the number persons belonged to each class or community in Gazetted, non-Gazetted and Class-IV posts. The information regarding number of students belonging to each class or community in professional technical colleges was called for from the Principals of the Colleges and from the Head Masters of High Schools and Multi-purpose High Schools regarding total number of students belonging to each community classwise. The Commission toured all the Districts in the State and recorded oral evidence. As per Appendix IV of its report, the Commission visited 97 places in all the districts including Madras, Trivandrum, Cochin and Bangalore outside the State. In all the places it is visited, it has examined 822 persons. According to the Commission, the total mileage covered both inside and outside the State is about 5,000 miles by road and rail and 1,800 miles by air. During its tours in the districts, the Commission visited the houses and huts belonging to different community people and made oral enquiries about the conditions of living, customs of people belonging to different communities. The Commission also prepared questionnaire in English and Telugu for obtaining necessary information from various communities and public. In response thereto, the Commission received replies from 175 individuals, State and District Backward Classes Organisations representing ninety communities. The Commission examined 822 persons and also considered 480 Memoranda submitted by persons. Then the Commission made its own assessment of the population, social economic and educational position of various communities, by collecting the data from census reports and authoritative books by experts like Edgar Thurston and Siraj-ul Hassan before embarking upon preparing the list of socially and

educationally backward classes. The work done by Anantaraman Commission was ultimately approved by the Supreme Court in **State of A.P. v Balaram**[36] (for short, **Balaram**).

Anantaraman submitted its report on 20.06.1970 recommending for recognizing ninety-two (92) castes; mostly Hindu castes - as backward classes under four (4) groups with separate quotas for each group. The Commission also considered number of representations from several Muslim Organisations and individual Muslims urging for inclusion of certain sub-sects of Muslims in the list of backward classes. Indeed, two elected representatives belonging to Muslim Minorities pleaded for classifying entire Muslim community as backward. The Commission rejected the claim concluding that all Muslims as a class in the State are not socially and educationally backward, that there was social equality among them and Muslims drawn from any stock are treated as equal unlike in Hindu society and that there was no restriction on the choice of occupations. Nonetheless Anantaraman found that some Muslim families like Dudekula, Kesab, Darzi, Momin, Mochi are continuing the occupation chosen by their ancestors and they are called by their trade name, that such occupations are regarded as inferior even among Muslims by reason of which, such families suffer social inferiority due to occupation and poverty. Accordingly, Anantaraman Commission recommended to include Dudekula (also known as Laddaf, Pinjari or Noorbash) in the list of backward classes. The Government accepted the recommendations of Anantaraman Commission and issued orders in G.O.No.1793, Education Department, dated 23.09.1970 (hereafter Reservation Order). This provides for reservation to backward classes under four groups i.e., 'A' 'B' 'C' and 'D' groups (the list was appended to the said Order). The Government, however, deleted two castes and added three more castes to the original list including Dudekula, Laddaf, Pinjari or Noorbash as item No.5 in the list under Group-B. Subsequently, Mehtar Muslims were also included as item No.39 in Group-A in the list of backward classes. Government proposed to review the list of backward classes after ten years. Thus, for the first time, sub-sects or occupational groups of Muslims found place in the list of backward classes which conventionally and traditionally was thought of consisting of only Hindu inferior castes/classes or inferior occupational groups among Hindus.

The Reservation Order of the Government was challenged in W.P.Nos.6090 of 1970 and W.P.Nos.221 and 543 of 1971. The writ petitions were dismissed by a learned single Judge of this court on 13.05.1971. In Letters Patent Appeal, however, the Division Bench struck down Reservation Order in **O.Venkateswara Rao v State of Andhra Pradesh**[37]. The State carried the matter in Appeal to the apex Court. In **Balaram**, the Supreme Court held that Reservation Order is saved by Article 15(4) of Constitution of India and upheld it.

In 1982, a one-man (second) Backward Classes Commission under N.K.Muralidhara Rao (hereinafter referred to as Muralidhara Rao Commission or Muralidhara Rao Report), an Officer of Indian Administrative Service, was appointed. There were two terms of references in the order appointing the Commission. These are: i) to review the recommendations made by Anantaraman Commission and implementation thereof for the purpose of determining the need to continue the existing special provisions in favour of backward classes under Articles 15(4) and 16(4) of Constitution and to review the existing list of backward classes in the light of social and educational progress achieved by those classes and (ii) to examine the Social and Educational Backwardness of Minority

communities for the purpose of including them in the list of backward classes.

Muralidhara Rao Commission prepared questionnaire dealing with social, educational and employment, economic and political aspects and invited the response from public, Members of Legislative Assembly (MLAs), Members of Legislative Council (MLCs), Members of Parliament (MPs) and Chairmen of Zilla Parishads and District Collectors. The Commission visited 21 District Headquarters in the State and other cities viz., Bombay, Madras and Bangalore during a period of about six months and examined 622 witnesses during public hearings and collected information running into ten thousand pages. The Commission also examined forty Heads of Departments, eleven CEOs of public sector undertakings, Registrars of seven Universities besides soliciting opinion of prominent leaders of backward classes and then took up review of the list of backward classes[38]. Muralidhara Rao submitted its report on 31.08.1982, *inter alia,* recommending to increase reservations of backward classes from 25% to 44% and included nine more castes/classes in the list of backward classes including a Muslim sub-sect 'Quresh' (Muslim butchers).

With regard to second term of reference, namely, examination of social and educational backwardness of Minority communities, Muralidhara Rao devoted Chapter VIII in its Report. After considering various representations received by it, the Commission negatived claim of Muslim community for inclusion in the list of backward classes for "except a few Muslim sects already included in the list of backward classes …, the other sects among Muslims are enjoying equal status and therefore there is no social backwardness among them". Support was also drawn from the conclusions of Kaka kalelkar Commission which is considered to be the first Backward Classes Commission appointed by President of India under Article 340[39] of Constitution of India. Muralidhara Rao also observed that, "there is no social backwardness among Muslims either in relation to various sects in their community or because of treatment by other religious groups like Hindus, Christians and Parsis.." Similarly the Commission also rejected the claim of Sikh community in the State of Andhra Pradesh for inclusion in the list of backward classes.

After considerable deliberations, the Government of Andhra Pradesh accepted recommendations of Muralidhara Rao Commission and issued three Government Orders on 15.07.1986. Of them, G.O.Ms.No.166 was a substantial order, *inter alia,* including nine other communities in the list. But Government rejected recommendation to delete Mehtar (Muslim scavengers). The other two Orders in G.O.Ms.Nos.167 and 168 were sequel and consequential. Be that as it is, these three Government Orders were tested in a batch of writ petitions before a Full Bench of this Court in **V.Narayana Rao v State of Andhra Pradesh**[40] (for short, **Narayana Rao**). By unanimous Judgment dated 05.09.1986 by Presiding Judge of Full Bench (Jeevan Reddy, K.Ramaswamy and Anjaneyulu,JJ; as their Lordships then were), this Court struck down clauses 13, 14, 15 and 18 of G.O.Ms.No.166 dated 15.07.1986 as violative of Articles 15 and 16 of Constitution of India. These clauses provided for raising percentage of reservation from 25% to 45% and excluded persons/families above the prescribed income limit from being given the benefit of reservations. Though the Full Bench in **Narayana Rao,** upheld the Government Order in other respects, the Government, however, thought it fit to maintain *status quo ante* that existed prior to 15.07.1986. As a result of this, there was no review of the list of backward classes in 1982 and 1986.

In accordance with law laid down by nine-Judge Bench of Supreme Court in **Indra Sawhney-I**, the State of Andhra Pradesh enacted B.C.Commission Act. In accordance with Section 3 thereof, the Government of Andhra Pradesh constituted Backward Classes Commission (hereinafter called B.C.Commission) under the Chairmanship of retired Judge of Karnataka High Court, Puttuswamy,J in G.O.Ms.No.9 dated 26.01.1994. The Commission was asked to examine requests for inclusion of any class of citizens as a backward class in the list and hear complaints of over-inclusion or under-inclusion of any backward class in such list and tender such advise to the Government, as it deems appropriate. While B.C.Commission was seized of the matter, the Government of the Day had to deal with an agitation by Kapu communities for inclusion in the list of backward classes. In spite of grant of concessions by the Government, the agitation did not subside. The Government then issued G.O.Ms.No.30 dated 25.08.1994 including fourteen castes/categories or classes of persons as backward classes in addition to the classes which were already included in the list of Backward Classes. Muslim community was one of fourteen additional classes identified to be included in the list of backward classes in Reservation Order.

The Government Order in G.O.Ms.No.30 dated 25.08.1994 was subject matter of challenge before a Full Bench of this Court in **A.P.State Backward Class Welfare Association v State of A.P., Backward Classes Welfare Department**[41] (for short, **A.P.S.B.C.Welfare Association**). Y.Bhasker Rao,J, (as his Lordship then was), with whom R.M.Bapat,J agreed, came to the conclusion that the Government can revise the list of backward classes only after consultation with B.C.Commission and that the writ petition is premature since the list of backward classes is not yet submitted to the State Government by the B.C.Commission. B.Subhashan Reddy,J (as his Lordship then was) wrote a separate opinion disagreeing with certain issues but agreeing with the result. Placing reliance on the statement made by learned Advocate General for the State that G.O.Ms.No.30 will not be given effect to until a report from B.C.Commission is obtained, the learned Judge injuncted the State not to give effect to the State orders till the B.C.Commission submits its report. As a result, fourteen additional classes/castes of citizens including Muslim community were not included in the list of backward classes.

The B.C.Commission, which was constituted in 1994, did not submit its report and its term of its office expired. In 2004, the Government issued orders in G.O.Ms.No.15 dated 04.06.2004 directing the Commissionerate of Minorities Welfare headed by ex-officio Secretary to Government to examine the social, economic and educational backwardness of Muslim community in the State. The said Commissioner submitted report within a month thereafter on 05.07.2004. A recommendation was made to provide five per cent reservation to Muslim Minorities in the fields of education and public employment. Accepting the recommendation, the Government issued G.O.Ms.No.33 dated 12.07.2004 directing that five per cent reservations be provided to Muslims in the State in educational institutions and employment in the State over and above reservations already provided to backward classes. The Government also directed to treat five per cent reservations for Muslims under Group-E, in addition to the existing A,B,C and D groups. It is necessary to read G.O.Ms.No.33 dated 12.07.1994, which is as under.

> The Commissionerate of Minorities Welfare, headed by the Ex-Officio Commissioner, has made an in depth study on the Socio-

Economic and Educational Conditions of Muslim Community in the State and submitted his report to Government.

The study focused mainly on the living conditions, occupational profile, income and literacy levels and participation in social activities. The said study was done through the District Minorities Welfare Officers and the officials of A.P. State Minorities Finance Corporation. The previous material and study on the Socio-Economic conditions of minorities in the State made by the A.P.State Minorities Commission was utilized by the Commissioner of Minorities Welfare in preparing the above said report on the Socio Economic conditions of Muslim Minorities in the State.

According to the 1991 census the population of Minorities in A.P. State is 72 lakhs (i.e.., 11% of total population). Out of which Muslim population is around 64 lakhs consisting of 8.5% of total population. The survey mainly focused on Educational, Economical, Social aspects.

The study report of Commissioner of Minorities on Socio-Economic condition of Muslim minorities revealed that around 65% of Muslims are living below poverty line (i.e., annual income Rs.11,000/- or below) and 16% are living under double poverty limit (i.e., annual income is Rs.44,500/- or below). The literacy rate among Muslim Minorities is only 18% as against 44% rate among other communities in the State as per 1991 Census. The literacy rate among Muslim women is very poor, which is only 4%.

The study revealed that most of the Muslims are engaged in petty business activity (viz., Pan Shop, Chai dukan, selling of fruits and flowers, as labourers in Engineering Work shops, watch servicing and repairs of Radio & T.V. etc.,) in addition as Rural artisans. The study report of Commissioner of Minorities Welfare revealed that the Socio-Economic Conditions of Muslim Minorities Community in the State are very poor due to poverty, illiteracy and in adequate representation in various fields of the society. The Commissioner of Minorities Welfare has finally recommended to provide 5% (five percent) reservations to Muslim Minorities in Employment and Educational Institutions.

The Government, after careful consideration of the recommendations made by the Commissioner of Minorities Welfare, hereby accept the same and order that Muslims in the State be provided with 5% (five percent) reservations in educational institutions and employment in the State, over and above the reservations presently provided to the Backward Classes and be treated as Backward Classes under Category E (in addition to the existing A,B,C,D categories.)

The General Administration (Services), Health, Medical and Family Welfare, Labour & Employment, Higher Education and School Education Departments are requested to make necessary amendments to the rules and regulations in this regard.

These orders will come into force with immediate effect.

(emphasis supplied)

The above Order was challenged before this Court in W.P.No.12239 of 2004 and batch. The matter was placed before a Full Bench of five learned Judges of this Court. The Full Bench in **T.Muralidhar Rao v State of A.P**[42] (for short, **Muralidhar Rao**) struck down the Government Order providing five per cent reservations for Muslims as violative of Articles 14, 15(1) and (4), and 16(1) and

(4) of Constitution of India. Sudershan Reddy, Chelameswar and Ghulam Mohammed,JJ delivered three separate judgments. They came to the conclusion that the report of Minorities Commissionerate is vitiated by non-application of mind, non-consideration of relevant factors and absence of scientific or reasoned investigation or enquiry. It was also held that in the absence of criteria for ascertaining backwardness and undertaking a complex investigation and enquiry, the exercise by the Commissionerate is futile (see ALD para 132 of Judgment of Sudershan Reddy,J and paras 63 and 72 of Judgment of Ghulam Mohammed,J). This Court also directed the Government to reconstitute B.C.Commission and initiate the process of consultation for inclusion of Muslim community in the list of backward classes.

After the Judgment of this Court, the Government reconstituted B.C.Commission headed by Justice Dalava Subrahmanyam, a retired Judge of this Court and with four other members. The Principal Secretary to Government in B.C.Welfare Department addressed a letter dated 25.11.2005 to B.C.Commission seeking opinion under Section 9(1) of the B.C.Commission Act whether to include Muslim community in the list of backward classes. After receiving the said reference; B.C.Commission invited public response, conducted public hearings at difference places, collected secondary data from different sources and submitted its report on 14.06.2005 known as "Report on Inclusion of Muslim Community in the List of Backward Classes in the State of Andhra Pradesh". Accepting the recommendations the State promulgated the impugned Ordinance on 21.06.2005.

Before we take up next issue, we may devote some space to notice relevant observations made by this Court in earlier Judgments, in the context of affirmative action aimed at Muslim community from the three Full Bench Judgments of this Court referred to hereinabove. In **Narayana Rao**, as seen from paras 24 and 33, a learned counsel while challenging the Government inaction in not including Muslim community as backward class, pleaded for inclusion of Muslims and/or to include Muslims in the professions like barbers, washermen, fishermen, mechanics, rickshaw pullers in as much as Hindus engaged in corresponding professions are included. Jeevan Reddy,J, extensively perused the Government records and found (AIR para 10) that the Government was advised not to include Muslims as a backward class as it would amount to including a group on the basis of religion, which is impermissible in law. His Lordship further dealt with this matter in para 33 of AIR as under.

> So far as the non-inclusion of Muslims in Backward Classes is concerned, it is contended by Sri Mukarramuddin that the Commission was wrong in making a recommendation against inclusion of Muslims. His contention is to the following effect. Once certain professional groups, like barbers, washermen, fishermen etc., among Hindus are included in backward classes, there is no reason why the groups among Muslims following the said professions also should not have been included. Counsel further submitted that there are a large number of rickshow-pullers belonging to Muslim community in the city who are also socially and educationally backward but who too have not been recommended to be included. Another specific contention of the learned Counsel is that there are a certain number of 'Multanis' in two villages in Adilabad District who are in a state of extreme social and educational backwardness, and that the Commission never took care to locate them or to investigate their conditions, or to recommend their inclusion. In our opinion, the reasoning of the learned Counsel is unacceptable. Barbers, washermen and fishermen among Hindus constitute a homogeneous group a caste, which is also a class within

the meaning of Art.15(4) the members whereof follow the particular profession generation after generation and as a matter of customary obligation; they constitute a homogeneous group identifiable by their profession, customs and practices. The same cannot be said of those following similar professions among Muslims. For that matter, any other Hindu belonging to forward classes may also choose to engage himself in any of the said professions but, for that reason he cannot be called a member of the homogeneous class of barbers, washermen or fishermen, as the case may be. The link between the caste and profession does not exist among Muslims.

As already noticed in **A.P.S.B.C.Welfare Association**, another Full Bench directed not to give effect to a Government Order for inclusion of fourteen communities including Muslims, in the list of backward classes. We may also observe that this decision was rendered primarily adverting to preliminary issue as to whether the Government can issue orders conferring benefit of reservation on certain classes of citizens bypassing the B.C.Commission. But one thing is clear that the attempt to provide reservations for entire Muslim community was not accepted by this Court whatever be the reason.

In **Muralidhar Rao**, a Full Bench considered the questions, *inter alia,* whether Muslims as a group are entitled to affirmative action and what is the criteria for identifying backward classes among non-Hindu communities. Sudershan Reddy,J, who delivered leading Judgment, summarized the conclusions in para 249 (of ALD). Conclusions 1(a) and 1(b) are relevant at this stage and are as under.

> 1(a). The expression "socially and educationally Backward Classes" in Article 15(4) and the expression "backward class of citizens" in Article 16(4) may include any caste, community or social group which may be identified as socially backward. That a caste is also a class of citizens and if such caste as a whole in its entirety is socially and educationally backward, provisions can be made in favour of such caste on the basis that it has socially and educationally backward class of citizens within the meaning of Article 15(4). The same can be treated as a backward class within the meaning of Article 16(4). Social backwardness may be found in other groups, classes and sections among the populace apart from the caste.
>
> 1(b). The Muslims as a group are entitled to affirmative action/social reservations within the constitutional dispensation, provided they are identified as Socially and Educationally Backward Class for the purposes of Article 15(4) and Backward Class of Citizens under Article 16(4). Providing social reservations to the Muslim Community or sections or groups amongst them in no manner militate against secularism, which is a part of basic structure of the Constitution.

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We may mention that this Court, in support of above conclusions referred to observations made in **Balaji** and **Indra Sawhney-I**.

PART V

ISSUES UNDER ARTICLES 15(4) AND 16(4)

This issue throws up different questions to be addressed. These, we propose to consider as different points, viz.,

i) Doctrine of Equality: Affirmative Action; ii) Social Backwardness: Concept and Content; iii) Judicial Review and Standard of Scrutiny; iv) Question of Muslims as

Backward Class and

v) B.C.Commission Report. In the last point, again we have for the sake of convenience propose to deal with the matter under different headings. Before considering these points, we may notice rival submissions on this issue. The learned counsel for the petitioners contend that Articles 15(4) and 16(4) of Constitution of India enable reservations to a class of citizens which are socially backward. After the Judgment of the Supreme Court in **Indra Sawhney-I**, the State may either by legislative enactment or by executive order declare a class of citizens as backward class of citizens but cannot classify citizens for the purpose of reservation, without obtaining the opinion of expert body. The expert body has to apply appropriate and relevant criteria for identifying backwardness of citizens after undertaking scientific survey of entire population. According to the learned counsel, having regard to the provisions of the Act, the B.C.Commission is required to notify the criteria and the material collected before embarking upon conducting public hearings to consider the objections of the public. In the absence of such effective hearing opportunity, the report of B.C.Commission is vitiated. Even if a particular class of citizens is identified as socially backward, the same has to be done by the expert commission like B.C.Commission in an objective and scientific manner at the stage of collecting sample data applying the known principles. According to them, the B.C.Commission has not laid down relevant criteria but applied irrelevant criteria in identifying Muslims as backward class. They would urge that the declaration in Section 3 of the impugned Ordinance that Muslims are backward class is not consistent with the law laid down by the Supreme Court in **Indra Sawhney-I**. Secondly, it is the contention that when any declaration of a class of citizens as backward is impugned, the burden justifying such affirmative action lies on the State. It has to produce the material before this Court justifying such policy. In scrutinizing the criteria, application of the criteria with reference to the material produced, the Court has to apply strict standard. The learned counsel made strenuous effort to demonstrate before us that the B.C.Commission, whose report is the basis for impugned Ordinance, fails to satisfy the “objective criteria test” for identification of backward classes and that the Commission has not made “best effort” in coming to such conclusions. It is also argued that when the impugned legislation affects fundamental rights, the object of the Ordinance and the legislative declaration of facts did not cloth the legislation with immunity. The Court is therefore entitled to examine the impugned Ordinance applying strict principles of judicial review.

The learned Advocate General for the State would urge that in view of the dicta of earlier Full Bench of five Judges in **Muralidhar Rao,** the issue whether Muslims as a group can be declared as backward class stands concluded. The criteria evolved by B.C.Commission is justified and there is no necessity for the Commission to indicate the criteria even before collection of data. Evolving the criteria after data collection is a fair procedure and does not cause any prejudice and the enquiry before B.C.Commission not being adversarial, the Rule of *adi alteram partem* is not attracted. With reference to certain decisions of the Supreme Court, the learned Advocate General argued that poverty of a class of citizens, occupation of such class of citizens, habitation conditions and education are valid criteria for determining social backwardness and therefore the criteria evolved by the B.C.Commission cannot be termed as irrelevant. According to him, even if the B.C.Commission referred to the data of National Sample Survey Organisation (NSSO), the same does not invalidate its report because the B.C.Commission did not place any reliance on the data of NSSO. According to the

learned Advocate General, educational backwardness and low percentage of Muslims in employment would lead to an inference that they are socially backward. The B.C.Commission has considered all factors and came to a conclusion. It is also the submission by the State that Ordinance being law, the same can be tested only on the ground of legislative competency and constitutionality and mere ground of irrationality cannot invalidate the impugned Ordinance.

1. DOCTRINE OF EQUALITY: AFFIRMATIVE ACTION

Article 14 injuncts the State not to deny to any person equality before the law or equal protection of laws. Articles 15 and 16 are other two avatars of Article 14 in two specified situations besides many more such situations. Having recognized the basic human right against discrimination, Articles 15(4) and 16(4) of Constitution enable the State to make special provision for backward class of citizens. To understand this, we may make general observations about doctrine of equality.

A large volume of legal literature is available dealing with content of principle of equality. The principle is simple. What is equal is to be treated as equal and what is different is to be treated differently. This idea also does not exclude different treatment of persons based on consideration of differences of factual circumstances like sex, age, socio economic conditions, education etc. Therefore, to treat all animates and inanimates equally adopting the doctrinaire approach would be unjust. Treating unequals equally is itself goes against principle of equality. All constitutionally governed sovereign nations in the world have adopted these principles of equality and scripted their fundamental laws aiming at these. Indeed, principle of equality which is in the nature of natural law has supra constitutional character, rightly placed by political thinkers at the summit of hierarchy of nations' system of law. All the laws made by sovereign bodies cannot ignore the principle of equality.

In constitutional endeavour 'equality' is its signature theme. Articles 14, 15 16 (with directive principles of State policy contained in Articles 38, 39, and 46) form the trinity provisions echoing nations endeavour to ensure social, economic and political justice and equality of status and opportunity to every citizen. The citizens belonging to weaker sections, especially those persons belonging to SCs and STs are given protection by the Constitution itself. For over five decades, be it either through executive action or legislation, the State has also made efforts for special treatment of those citizens who are above SCs and STs in all respects, but below the advanced groups in terms of social, political and economic parameters. The reservations for these backward classes have received imprimatur of the higher judiciary of the nation as dispensation of social justice to weaker sections. So to say the Courts have ruled that treating the members belonging to SCs/STs/BCs on par with advanced groups would itself violate Articles 14, 15 and 16, and therefore the policy of reservation is not an exception but integral part of dynamic concept of equality. Who among the three organs of the State are entrusted with ensuring the reasonable working principle of equality? It is no doubt true that the directive principles of state policy cannot be ignored by all the three organs of the State, but it is now well settled that by reason of being repositories of power to make a Legislative power and/or delegated Legislation and as depositories of the vast executive powers of the State, it is the executive which is entrusted with the constitutional duty of ensuring that 'all equals are treated equally

and all unequals are not treated equally'. Therefore, it is the Executive of the State, which has to provide for reservation and also provide *raiso d' Etre* for such policy when called upon by the Court while scrutinising the policy of reservation. What standards the Courts must apply while subjecting a policy of reservation to curial scrutiny. This is an important aspect in the present case, which needs consideration separately.

There can be no two opinions that constitutional governance by the State in any country has to take special care of those who due to historical and political reasons are pushed to the low visibility zone in society. Different countries have adopted different methods. The special treatment given to people in weaker sections and minority groups is a universal phenomenon now. In Australia, India, Malaysia, Sri Lanka, United States of America as well as in European and African countries such programmes have been designed. Of course, after advent of vigorous human rights moment, special groups like children, women and differently abled persons (physically handicapped) are assured special treatment in jobs and other positions. These endeavours by various countries have also been received approval, sometimes by the Legislatures and more often than not by highest judiciary of the country. The special treatment given to socially, politically and economically backward groups came to be known as "affirmative action", "first order discrimination" and "reverse discrimination". All these legally coined terms indicate constitutional philosophy that the State should affirmatively and positively adopt discriminatory policies to enforce equality among unequals by treating unequals differently and equals in a different manner. The affirmative action cannot, however, be arbitrary to violate of the basic principle of equality, in that, there should be proper justification and rationalization for every State policy of affirmative action. Though there is no explicit prescription; unlike in India - in American law, for ethnicity or gender based preferences, the U.S.Courts have interpreted equal protection clauses of the Fifty Amendment and Fourteenth Amendment[43], as permitting only conditional constitutional backing for affirmative action.

The affirmative action by the State Government has an equalising principle. As a measure of providing equal opportunity it may involve many steps and many methods. The affirmative action or positive discrimination by the State is by way of implementing a special policy targeted at backward classes. These are three basic types. First, there are reservations, which allot or facilitate access to value posts or resources. The most important instances of this type are reserved seats in Legislatures, reservation of posts in Government Services and reservation of places in academic institutions. Second, there are programmes for provision of scholarships, land allotments, grants for health care etc. Third, there are special protections like prohibiting exploitation of backward classes especially Scheduled Castes and Scheduled Tribes by others[44]. Reservation of positions for Scheduled Castes/Scheduled Tribes in Legislatures is mandatory and the provision of reservation in academic institutions and public employment is not mandatory and it is only in discharge of duty of the State to provide equal opportunity to backward classes.

Articles 14, 15, 16, 29 in part III and Articles 37, 38, 41, 42, 43 and 46 of Constitution of India in no uncertain terms declare social justice as the ultimate goal of the nation. The governance is no governance if the same does not promote educational and economic interest of the weaker sections of the people, who for centuries were deprived of their legitimate due. Therefore, the Central Government and the State Governments so as to give effect to the policy of social justice took policy measures to usher in functional equality, equality of status and equality of opportunity. Each area of these policy options generated large volume of litigation in the country. Though in **Indra Sawhney-I**, a nine-Judge Bench authoritatively decided all issues, there are still areas that crop up depending on various changing situations.

2. SOCIAL BACKWARDNESS: CONCEPT AND CONTENT

As we presently point out 'special provision for the advancement of socially and educationally backward classes of citizens' as per Article 15(4) of Constitution of India or any provision for the reservation of appointments or posts in favour of backward classes of citizens, which is not adequately represented in the services under the State as per Article 16(4) of Constitution of India convey the same meaning. These two provisions, it is also settled – are enabling provisions and cast a duty on the State to provide for reservations only to socially and educationally backward classes of citizens. The submission made by the learned counsel is to the effect that unless a group/class of citizens is identified or characterized as socially backward, mere educational, economic and political backwardness would not enable the State to make provision under Articles 15(4) and 16(4) of Constitution of India. Needless to point out that Constitution enables a provision for reservations only to backward class of citizens and not any citizen/citizens who might be backward in all walks of life due to_inherent human shortcomings. An individual who belongs to an identified class of socially and educationally backward class of citizens can avail such benefit, not because he is an individual but because he is a member of identified backward class of citizens. Most difficult task is, however, identification of a class of citizens who are socially and educationally backward.

The subject of affirmative action as a State policy of compensatory and/or discriminatory justice has itself attained the status of a separate branch of Indian Constitution Law. It is very interesting to note that; comparatively, the reservations in educational institutions and public employment in favour of Scheduled Castes and Scheduled Tribes is not very much the bone of contention before the apex Court. It is the reservation in favour of other backward classes (OBC) in public services, which has attained the proportions of volcanic eruption throwing up social, economic and legal questions every decade, decade after decade since independence. Some of the important decisions in the field are **State of Madras v Champakam Dorai Rajan**[45], **Balaji**, **Devadasan v Union of**

India[46], **Chitralekha v State of Mysore**[47] (for short, **Chitralekha**), **Triloki Nath Tiku v State of Jammu & Kashmir**[48] (for short, **Triloki Nath**) , **Sagar** (supra), **Balaram**, **Janaki Prasad Parimoo v State of Jammu & Kashmir**[49] (for short, **Janaki Prasad**) , **State of U.P., v Pradip Tandon**[50] (for short, **Pradip Tandon**) , **State of Kerala v Thomas**[51] (for short, **Thomas**) , **K.S.Jayasree v State of Kerala**[52] (for short, **Jayasree**) , **K.C.Vasanth Kumar v State of Karnataka**[53] (for short, **Vasanth Kumar**), **Indra Sawhney-I, Ajay Kumar Singh v State of Bihar**[54] (for short, **Ajay Kumar Singh**) and **Indra Sawhney-II v Union of India**[55] (for short, **Indra Sawhney-II**). We may, however, refer to a few of them directly on the point of determination of social and educational backwardness.

In **Balaji**, which influenced all later decisions, it was observed (AIR para 24):

> The occupations of citizens may also contribute to make classes of citizens socially backward. There are some occupations which are treated as inferior according to conventional beliefs and classes of citizens who follow these occupations are apt to become socially backward. The place of habitation also plays not a minor part in determining the backwardness of a community of persons. In a sense, the problem of social backwardness is the problem of Rural India and in that behalf, classes of citizens occupying a socially backward position in rural area fall within the purview of Art. 15(4). **The problem of determining who are socially backward classes is undoubtedly very complex. Sociological, social and economic considerations come into play in solving the problem, and evolving proper criteria for determining which classes are socially backward is obviously a very difficult task; it will need an elaborate investigation and collection of data and examining the said data in a rational and scientific way. That is the function of the State which purports to act under Art. 15(4). All that this Court is called upon to do in dealing with the present petitions is to decide whether the tests applied by the impugned order are valid under Art. 15(4). If it appears that the test applied by the order in that behalf is improper and invalid, then the classification of socially backward classes based on that test will have to be held to be inconsistent with the requirements of Art. 15(4).**
>
> (emphasis supplied)

In **Chitralekha**, it was observed (AIR paras 19 and 20):

> These provisions recognize the factual existence of backward classes in our country brought about by historical reasons and make a sincere attempt to promote the welfare of the weaker sections thereof. They shall be so construed as to effectuate the said policy but not to give weightage to progressive sections of our society under the false colour of caste to which they happen to belong. The important factor to be noticed in Art. 15 (4) is that it does not speak of castes, but only speaks of classes. If the makers of the Constitution intended to take castes also as units of social and educational backwardness, they would have said so as they have said in the case of the Scheduled

Castes and the Schedule Tribes. Though it may be suggested that the wider expression "classes" is used in cl. (4) of Art. 15 as there are communities without castes, if the intention was to equate classes with castes, nothing prevented the makers of the Constitution to use the expression "Backward Classes or castes". The juxtaposition of the expression "Backward Classes" and "Scheduled Castes" in Art. 15(4) also leads to a reasonable inference that the expression "classes" is not synonymous with castes. **It may be that for ascertaining whether a particular citizen or a group of citizens belong to a backward class or not, his or their caste may have some relevance, but it cannot be either the sole or the dominant criterion for ascertaining the class to which he or they belong.**

This interpretation will carry out the intention of the Constitution expressed in the aforesaid Articles. It helps the really Backward Classes instead of promoting the interests of individuals or groups who, they belong to a particular caste a majority whereof is socially and educationally backward, really belong to a class which is socially and educationally advanced. To illustrate, take a caste in a State which is numerically the largest therein. It may be that though a majority of the people in that caste are socially and educationally backward, and effective minority may be socially and educationally far more advanced than another small sub-caste the total number of which is far less than the said minority. **If we interpret the expression "classes" as "castes", the object of the Constitution will be frustrated and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve. This anomaly will not arise if, without equating caste with class, caste is taken as only one of the considerations to ascertain whether a person belongs to a backward class or not. On the other hand, if the entire sub-caste, by and large, is backward, it may be included in the Scheduled Castes by following the appropriate procedure laid down by the Constitution.**

(emphasis supplied)

In **Pradip Tandon**, it was held (AIR paras 18 and 20):

The traits of social backwardness are these. There is no social structure. There is no social hierarchy. There are no means of controlling the environment through technology. There is no organization of the society to create inducements for uplift of the people and improvement of economy. Building of towns and industries, growth of cash economy which are responsible for greater social wealth are absent among such classes. Social growth and well being can be satisfied by massive charge in resource conditions. High lands and hills are to be developed in fiscal values and natural-resources. Nature is a treasury. Forests, mountains, rivers can yield an advanced society with the aid of education and technology…..

Educational backwardness is ascertained with reference to these factors. Where people have traditional apathy for education on account of social and environmental conditions or occupational handicaps, it is an illustration of educational backwardness. The hill and Uttrakhand areas are inaccessible. There is lack of educational institutions and educational aids. People in the hill and Uttrakhand

areas illustrate the educationally backward classes of citizens because lack of educational facilities keep them stagnant and they have neither meaning and values nor awareness for education.

(emphasis supplied)

I n **Vasanth Kumar**, the following excerpts from the opinions of Desai, Chinnappa Reddy, Sen and Venkataramiah,JJ are relevant and worth quoting.

Desai,J made the following observations (AIR para 25)

A few other aspects for rejecting caste as the basis for identifying social and educational backwardness may be briefly noted. If State patronage for preferred treatment accepts caste as the only insignia for determining social and educational backwardness, the danger looms large that this approach alone would legitimise and perpetuate caste system. It does not go well with our proclaimed secular character as enshrined in the Preamble to the Constitution. **The assumption that all members of some caste are equally socially and educationally backward is not well-founded. Such an approach provides an oversimplification of a complex problem of identifying the social and educational backwardness.**

(emphasis supplied)

Chinnappa Reddy,J made the following observations (AIR paras 38 and 79):

…Sometimes it may be possible to readily identify certain castes or social groups as a whole as socially forward or socially backward classes. Poverty, of course, is basic, being the root cause as well as the rueful result of social and educational backwardness. B u t **mere poverty it seems is not enough to invite the Constitutional branding, because of the vast majority of the people of our country are poverty-struck but some among them are socially and educationally forward and others backward. In a country like India where 80% of the people live below the bread-line, even the majority of the so-called socially forward classes may be poor.** For example no one will think of describing Brahmins anywhere in the land as socially and educationally backward however, poor they might be. The idea that poor Brahmins may also be eligible for the benefits of Articles 15(4) and 16(4) is, too grotesque even to be considered. Similarly no one can possibly claim, that the Patels of Gujarat, the Kayasthas of Bengal, the Reddys and Kammas of Andhra Pradesh are socially backward classes, despite the fact that the majority of them may be poor farmers and agricultural labourers. In the rural, social ladder they are indeed high up and despite the economic backwardness of sizeable sections of them, they cannot be branded as socially backward. On the other hand, there are several castes or other social groups who have only to be named to be, immediately identified as socially and economically backward classes, identified as socially backward classes.

(emphasis supplied)

The following observations at AIR para 110 are also relevant and are extracted.

An examination of the question in the background of the

Indian social conditions shows that the expression 'backward classes' used in the Constitution referred only to those who were born in particular castes, or who belonged to particular races or tribes or religious minorities which were backward.

(emphasis supplied)

The following observations at AIR para 147 of Venkataramiah,J, need to be noticed.

> There is one other basis on which a classification made for purposes of Article 15(4) or Article 16(4) of the Constitution has received the approval of this Court in Chitralekha's case (AIR 1964 SC 1823) (supra). In that case the Court was concerned with a list of backward classes prepared on the basis of economic condition and occupation. According to that Government order, persons whose family income was Rs.1,200/- per annum or less and who were engaged in occupations such as agriculture, petty business, inferior services, crafts or other occupations involving manual labour were treated as belonging to backward classes…. …It is apparent that this 'special group' is a creature of social, economic and political necessity. Since a classification made on the above said basis has received the approval of a Constitution Bench of equal strength and its correctness is not challenged before us, we treat this classification as a valid one even though a criticism of this kind of classification was made, not unjustifiably as we now see, by the Mysore High Court in D.G.Viswanath's case AIR 1964 Mys 132. **This classification would include persons of all castes, groups and communities provided the two tests namely, occupation test and income test are satisfied.**
>
> (emphasis supplied)

I n **Indra Sawhney-I**, the Supreme Court considered the meaning of the expression "backward class of citizens" and the question of identification of backward class of citizens. After referring to various earlier decisions noticed hereinabove, Jeevan Reddy,J (with whom three other learned Judges joined in the opinion) summed up social backwardness as under (SCC para 788).

> It goes without saying that in the Indian context, **social backwardness leads to educational backwardness and both of them together lead to poverty – which in turn breeds and perpetuates the social and educational backwardness. They feed upon each other constituting a vicious circle.** It is a well-known fact that till independence the administrative apparatus was manned almost exclusively by members of the 'upper' castes. The **Shudras, the Scheduled Castes and the Scheduled Tribes and other similar backward social groups among Muslims and Christians had practically no entry into the administrative apparatus. It was this imbalance which was sought to be redressed by providing for reservations in favour of such backward classes**….. The idea was to enable them to share the State power. We are, accordingly, of the opinion that the **backwardness contemplated by Article 16(4) is mainly social backwardness**. It would not be correct to say that the backwardness under Article 16(4) should be both social and educational. The Scheduled Tribes and the Scheduled Castes are

without a doubt backward for the purposes of the clause; no one has suggested that they should satisfy the test of social and educational backwardness. It is necessary to state at this stage that the Mandal Commission appointed under Article 340 was concerned only with the socially and educationally backward classes contemplated by the said article. Even so, it is evident that social backwardness has been given precedence over others by the Mandal Commission – 12 out of 22 total points. **Social backwardness – it may be reiterated – leads to educational and economic backwardness. No objection can be, nor is taken, to the validity and relevancy of the criteria adopted by the Mandal Commission.**

(emphasis supplied)

Dealing with meaning of 'backward class of citizens' in Article 16(4), it was also laid down as under (SCC paras 796-797).

(a) A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons are socially backward. They too represent backward social collectivities for the purposes of Article 16(4). (b) Neither the Constitution nor the law prescribe the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method / procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be done with reference to castes among, and along with, other groups, classes and sections of people. One can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does - what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. **The central idea and overall objective should be to consider all available groups, sections and classes in society.** Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one can well begin with it and then go to other groups, sections and classes. (c) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Caste/Scheduled Tribes. (d) 'Creamy layer' can be, and must, be excluded. (e) It is not correct to say that the backward class contemplated by Article 16(4) is limited to the socially and educationally backward classes referred to in Article 15(4) and Article 340. It is much wider. The test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression "backward class of citizens." **The accent in Article 16(4) appears to be on social backwardness. Of course, social, educational and economic backwardness are closely intertwined in the Indian context. The classes contemplated by Article 16(4) may be wider than those contemplated by Article 15(4).**

(emphasis supplied)

We may now sum up the discussion under this point briefly as under. The

identification of backward class of citizens is such a complicated and complex issue that the apex Court refrained from laying down any invincible test or tests. The Supreme Court, however, pointed out the three areas, a study of which would give an indication of social backwardness if a group or groups of people whose claims are to be considered. We may call these tests as
i) caste test; ii) occupation test and iii) income test. Be it also noted that as held by the Supreme Court in some of the tests including **Indra Sawhney-I** educational backwardness and economic backwardness may themselves contribute to social backwardness. So to say, when the authority or commission assigned with duty to identify backward class of citizens, such study must be with reference to certain normative standards and with reference to the three tests. Mere satisfaction of either of the three tests may not necessarily lead to backwardness but only indicative of backwardness.

'Caste test' or 'social test' was first considered by the Supreme Court in **Balaji** (AIR para 23). It was pointed out that if the classification of backward class of citizens is based solely on the caste, it would be illogical and that social backwardness may be due to poverty and if such poverty is by reason of the caste or class, the caste would be relevant factor. It was observed in **Balaji** that, "social backwardness which results from poverty is likely to be aggravated by consideration of castes to which the poor citizens may belong but that only shows the relevance of both caste and poverty in determining the backwardness of citizens". The same view was reiterated in **Jayasree** and **Vasanth Kumar**. In **Indra Sawhney-I** (SCC paras 788 and 796), the Supreme Court while observing that a caste is a social class and if it is backward socially, it would be backward class of citizens for the purpose of Article 16(4) because social backwardness leads to educational backwardness and both of them lead to poverty. Justice Thommen in a separate Judgment laid down that poverty which is continued ill-effect of identified prior discrimination resulting backwardness demands affirmative action (SCC para 283). Social backwardness may lead to economic backwardness and educational backwardness of the entire class of people belonging to one particular caste.

That occupation of citizens makes classes or castes of citizens socially backward when such occupations are treated as inferior according to conventional beliefs, occupation test is best suited. That was so held in **Balaji, Vasanth Kumar** and **Indra Sawhney-I**. However, as pointed out by Jeevan Reddy,J in **Narayana Rao**, the occupation test may not correctly enable the identification of backward class of citizens among non-Hindu groups or communities. In such cases, the Commission and the Government is required to be very cautious and careful. For instance, all classes of citizens belonging to all communities may take to the avocation of rickshaw pullers, which is not one of the traditional occupations recognized anywhere. Nobody can say that majority people belonging to particular community take to rickshaw pulling and therefore it becomes an occupation. In terms of sociology, an occupational group is one which by tradition embrace the occupation and ordinarily would not allow others to enter the group. Venkataramiah,J in **Vasanth Kumar**, however, observed that occupation test permits to include persons of all castes, groups and communities provided the income test is also satisfied. Here again, there is no inflexible rule. If state of penury of persons belonging to an occupational group is by reason of prior discrimination resulting in backwardness, it would certainly be a relevant factor. As held by the Supreme Court in umpteen number of cases, there cannot be any definite or only test or tests for identifying social backwardness among the

members of a group of citizens.

The study of educational backwardness and economic backwardness by themselves do not lead to any predictions. Such study would be part of the study of social backwardness and therefore any Commission has to take up the question of determination of social backwardness in a comprehensive manner as held in various Supreme Court authorities.

Mandal Commission evolved caste (social) test, educational test and economic test. In caste test, which was considered under the category social – four parameters; under educational test – three parameters; and under economic test – four parameters; were evolved and applied to the data collected by the Commission. This method received imprimatur of the Supreme Court in **Indra Sawhney-I** (see para 788). Further, Anantaraman Commission adopted three tests, namely, i) general poverty of the class of community as a whole (income test); ii) the occupation by class of citizens which is inferior, unclean and undignified and unremunerative (occupation test) and iii) caste in relation to Hindus (caste test). Though the Division Bench of this Court did not accept this, the Supreme Court in **Balaram** approved the method and criteria evolved by Anantaraman Commission. The learned counsel for the State and other contesting respondents have not brought to the notice of this Court any decision or any authority which has approved only the education test and only income test.

3. JUDICIAL REVIEW: STANDARD OF SCRUTINY

In United States, affirmative action or positive discrimination is permissible on the State showing compelling State interest on the application of strict scrutiny test that narrowly tailored policy of racial discrimination is intended to compensate past injustice and was to benefit a group of citizens who need such separate treatment. As we presently show, of late, the U.S.Supreme Court held that strict scrutiny governs whenever race based classifications violate the equal protection component of "Due Process Clause" and that any racial classification is immediately suspect of being inconsistent with Fifth and Fourteenth (as the case may be) Amendments of U.S.Constitution. In India, according to us, in all the cases where the Supreme Court either approved or disapproved policy of affirmative action, invariably strict scrutiny was applied to see whether such class (or caste) based discriminatory classification was necessary. But – as we presently show; in the matter of State coming to a conclusion on relevant material about backwardness in relation to an identified group/class of people, the Courts have in secondary review by and large adopted the "principle of leaving to the State"; what is in U.S. Constitutional parlance came to be known as 'deferential scrutiny' (i.e., due regard to decision of State and resorting to searching review only in decision making process only). We will deal with this aspect in this portion of the Judgment.

For further examining the issue, it is but essential to refer to the relevant Judgments of various Courts touching upon the subject. Is it the rule of 'strict scrutiny' that is applied when the policy of reservations is questioned as violating 'equal protection principle' or is it sufficient to leave the matter in deference to the opinion of the State as being opinion taken after 'subjective satisfaction' based on relevant data from any source? In **Defunis v Charles Odegard**[56], the question was the constitutionality of an admission policy of University of Washington whereunder certain percentage of seats in Law School was reserved for minority. The trial Court held the admission policy as violative of 'equal protection clause' in Fourteenth Amendment and the Supreme Court of Washington reversed the same.

The U.S. Supreme Court upheld the special admission programme. What is important is that the U.S. Supreme Court in this Judgment referred to the judicial policy of 'strict scrutiny' in matters of 'equal protection clause'. So to say, any programme employing 'racial classification' to favour certain minority groups would be subject to strict scrutiny by the constitutional Court under 'equal protection clause'.

The view of 'strict scrutiny' by the Courts in matters of reservation/ special programmes was, however, ignored by the U.S. Supreme Court in **Metro Broadcasting Inc. v Federal Communications Commission**[57] (for short, **Metro Broadcasting**). In establishing radio and TV Broadcasting stations just 2.1% of minority groups owned such business. The Federal Communications Commission, a body vested with exclusive authority to grant licences for radio and TV broadcasting under the Communications Act, 1934, proposed to provide preference to minority groups in the matter of licences. The Commission also proposed to compel the existing licensee who incurred disqualifications to transfer the radio and TV licences to a member of minority so as to escape the wrath of disqualification. The Metro Broadcasting Corporation. questioned the same and ultimately the case reached the U.S. Supreme Court. The conclusions of the U.S. Supreme Court as summarized in **Indra Sawhney-I** (SCC para 730) compel excerption:

> …The decision of the Majority (Brennan, White, Marshall, Blackmun and Stevens, JJ) rendered by Brennan, J is noteworthy for the shift of approach from the earlier decisions. It is now held that a classification based on race (benign race conscious measures) is constitutionally permissible even if it is not designed to compensate victims of past governmental or societal discrimination so long as it serves important governmental objectives and is substantially related to achievement of those objectives. **In other words, it is held that it is not necessary that the Court apply a strict standard of scrutiny to evaluate racial classification to ascertain whether it is necessary for achieving the relevant objective and further whether it is narrowly tailored to achieve a compelling state interest.** Brennan, J relied upon the opinion of the Chief Justice Burger in Fullilove (1980) 65 Law Ed. 2d 902) for this liberal approach….
>
> (emphasis supplied)

The Supreme Court did not either accept or reject strict scrutiny test to review affirmative action. While observing that, "ideas appear to be still in the process of evolution" (SCC para 733) Jeevan Reddy,J answered question No.9 dealing with extent of judicial review, thus (SCC para 842)

> It is enough to say on this question that there is no particular or special standard of judicial scrutiny in matters arising under Article 16(4) or for that matter, under article 15(4). **The extent and scope of judicial scrutiny depends upon the nature of the subject-matter, the nature of the right affected, the character of the legal and constitutional provisions applicable and so on.** The acts and orders of the State made under Article 16(4) do not enjoy any particular kind of immunity. At the same time, we must say that court would normally extend due deference to the judgment and discretion of the executive – a co-equal wing – in these matters. The political executive, drawn as it is from the people and represent as it does the majority will of the people, is presumed to know the conditions and the

needs of the people and hence its judgment in matters within its judgment and discretion will be entitled to due weight. More than this, it is neither possible nor desirable to say. It is not necessary to answer the question as framed.

(emphasis supplied)

By the time the Supreme Court delivered Judgment in **Indra Sawhney-I**, the law as to standard of scrutiny of affirmative action was evolving the Unites States. The same reached position of finality in **Adarand Constructors, Inc., v Pena**[58] (for short, **Adarand Constructors-I**). In this case, the United States Department of Transportation through its Central Federal Lands Highway Division awarded contract to Mountain Gravel and Construction Company. The contract provided that if the prime contractor hires sub-contractors certified as small businesses controlled by "socially and economically disadvantaged individuals", they would receive additional rates or compensation. When prime contractor solicited bids from sub-contractors, Adarand Constructors submitted the low bid. In spite of the same, Mountain Gravel awarded the sub contract to Gonzales, which was certified small business belonging to disadvantaged individuals including Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and other minorities. Adarand Constructors approached District Court at Colorado claiming that race based presumptions violate right to equal protection component of Fifth Amendment Due Process Clause. The suit was summarily dismissed placing reliance on **Fullilove v Klutznick**[59], which adopted a lenient standard or intermediate scrutiny in assessing the constitutionality of race based federal action. The Court of Appeals also applied the intermediate scrutiny, as further developed in **Metro Broadcasting,** and upheld federal law. The U.S. Supreme Court, however, did not agree. Justice Sandra J O'Connor, who wrote the Court's opinion vacated the Judgment of Court of Appeals and remanded the case for further proceedings holding that all racial classifications must be analysed by a reviewing Court under strict scrutiny to find out whether racial classifications are benign and narrowly tailored to benefit those who suffer lingering effects of racial discrimination. After referring to earlier decisions of U.S. Supreme Court, ruled as under.

It follows from that principle that all governmental action based on race – a group classification long recognized as "in most circumstances irrelevant and therefore prohibited," should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection, and holding "benign" state and federal racial classifications to different standards does not square with them. "[A] free people whose institutions are founded upon the doctrine of equality," should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. **Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that Metro Broadcasting is inconsistent with that holding, it is overruled.**

(emphasis supplied)

Chief Justice Rehnquist, and Justices Kennedy and Thomas agreed with Justice O'Connor. The Judgment of the U.S. Supreme Court was subsequently followed in **Adarand Constructors Inc-II v Norman Y.Mineta**[60], **Goetzer v Bollinger**[61], **Jennifer Gratz v Lee Bollinger**[62] and **Garrison S. Johnson v California**[63].

In **Jennifer Gratz,** U.S. Supreme Court was dealing with constitutional compliance (compliance with Fourteenth Amendment) of admission programme of University of Michigan's College of Literature, Science and Arts in automatically awarding twenty points to applicants belonging to under-represented minority. Chief Justice Rehnquist, after referring to **Adarand Constructors-I**, **Richmond v J.A.Croson Co.,**[64] and **Fullilove**, explained that strict scrutiny standard is applicable to review classifications based on race. The Learned Chief Justice observed, thus:

> To withstand our strict scrutiny analysis, respondents must demonstrate that the University's use of race in its current admission program employs "narrowly tailored measures that further compelling governmental interests." Because "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," our review of whether such requirements have been met must entail " 'a most searching examination.' " We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.

In **Garrison v California** (supra), Justice O'Connor further explored strict scrutiny principle as under.

> We have held that "all racial classifications [imposed by government] … must be analyzed by a reviewing court under strict scrutiny." **Under strict scrutiny, the government has the burden of proving that racial classifications "are narrowly tailored measures that further compelling governmental interests**." We have insisted on strict scrutiny in every context, even for so-called "benign" racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation …The reasons for strict scrutiny are familiar. **Racial classifications raise special fears that they are motivated by an invidious purpose**. Thus, we have admonished time and again that, "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining … what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics". We therefore apply strict scrutiny to all racial classifications to " 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool".

(emphasis supplied)

Thus, in so far as the review of affirmative action policy in U.S. is concerned, the U.S.Supreme Court ultimately accepted strict scrutiny standard as opposed to intermediate standard or deferential standard. Any classification by the State benefiting Minorities and/or racial groups must not only be valid classification under Fifth and Fourteenth Amendment Due Process Clause, but should also be demonstrated (before the Court by producing acceptable evidence), that such racial classification is narrowly tailored for compensating past injury due to discrimination and/or is aimed at meeting a situation of compelling State interest. The Court has even gone to the extent of saying that mere assertion by the State would not be sufficient and it is for the Court to rule that the policy indeed benefits minorities and racial groups without in any manner violating equality clause in the Constitution except to the extent of narrowly deviating from such equality.

In India, the Law in this regard cannot be said to be settled. Indeed, in the leading opinion, Jeevan Reddy,J held that the extent and scope of judicial review depends on the nature of the subject matter, the nature of the right affected, the character of legal and constitutional provisions applicable and so on. In the light of this, we have examined the leading cases which arose under Articles 15(4) and 16(4) of Constitution of India. After giving deep and anxious consideration, we have come to the conclusion that when a policy of affirmative action providing reservations in educational institutions and public employment is brought before the Court for judicial review, the Court should apply strict scrutiny test while taking up primary review of the matter. But when the policy is tested on the ground of arbitrariness and reasonableness – that is to say secondary review; the Court should stick to intermediate scrutiny or deferential standard scrutiny compelling the State to show the minimum rationality in such action. The reasoning for this conclusion of ours is discussed infra.

Doctrine of Equality is the thread that weaves the entire constitution. Being an admonition to the State, right to equality and equal protection of Laws in Article 14 of Constitution of India cannot be waived nor acquiesced. In about six decades after Independence, the content and concept in Article 14 has undergone vast changes. This can be visualized in three stages. In the first stage, Indian Courts drawing heavily from American Precedents interpreted Article 14 of Constitution of India as allowing classification of men and material. Legislation should always adhere to the principle of equality before laws and equal protection of laws. This does not however mean that the Legislation is denied the power to classify animate as well as inanimate things for the purpose of Legislation. The doctrine of classification by the Legislature or the executive as recognized in American Constitutional Law is now part of Indian Law. In **State of West Bengal v Anwar Ali Sarkar**[65], **Bhudan Choudary v State of Bihar**[66] and **Ramakrishna Dalmiya v Tendulkar**[67]; to mention a few - the Supreme Court upheld the power of the Legislature to classify men and materials for the purpose of Legislation. Legislation or executive action adopting classification has to pass rationality test and nexus test, namely, that the classification is founded on intelligible differentia

and that the differentia has rational relation to the object sought to be achieved. It must also be noticed that when men and material are divided on the basis of classification, it need not be based on perfect arithmetic precision. The broad indicia would suffice twin tests of classification. In **State of Andhra Pradesh v Nallamilli Rami Reddy**[68], the Supreme Court while upholding sub-section (1) of Section 82 of the A.P.Charitable and Hindu Religious Institutions and Endowments Act, 1987, repelled the contention that classification of tenants of the lands held by religious institutions or endowments was unreasonable and it has no nexus with the object sought to be achieved and reiterated the principles of classification as under.

> **What Article 14 of the Constitution prohibits is "class legislation" and not "classification for purpose of legislation".** If the legislature reasonably classifies persons for legislative purposes so as to bring them under a well defined class, it is not open to challenge on the ground of denial of equal treatment that the law does not apply to other persons. The test of permissible classification is two-fold: (i) that the classification must be founded on intelligible differentia which distinguishes persons grouped together from others who are left out of the group, and (ii) that differentia must have a rational connection to the object sought to be achieved. **Article 14 does not insist upon classification, which is scientifically perfect or logically complete. A classification would be justified unless it is patently arbitrary. If there is equality and uniformity in each group, the law will not become discriminatory, though due to some fortuitous circumstances arising out of peculiar situation some included in a class get an advantage over others so long as they are not singled out for special treatment. In substance, the differentia required is that it must be real and substantial, bearing some just and reasonable relation to the object of the legislation.**
>
> (emphasis supplied)

In the second stage of its development, we see Article 14 takes off differently in **Jaisinghani v Union of India**[69] (for short, **Jaisinghani**), when the Supreme Court ruled that any decision should be taken by the application of known principles, that it should be predictable and that if a decision is taken without any principle or rule, being unpredictable such decision is antithesis of rule of law. This new content of Article 14 not only allowed the Court to examine whether classification was discriminatory but also to examine whether the impugned legislative/executive action satisfied minimum rationality test, that is to say whether such action is arbitrary, capricious and irrational. In **E.P.Royappa v State of Tamil Nadu**[70] (for short, **E.P.Royappa**) and **Maneka Gandhi v Union of India**[71] (for short, **Maneka Gandhi**), P.N.Bhagwati,J (as His Lordship then was) ruled that if an administrative action or legislative action is irrational in the sense it lacks the discernible principle, it is arbitrary, which is antithesis to equality and should accordingly suffer judicial invalidation. Therefore, every State action must be proved to be rationale and not arbitrary. It is now well settled that if an action is

taken without reasons, the same is unfair and what is unreasonable and unfair is arbitrary impinging Article 14 of Constitution of India. In support of this apart from **Jaisinghani**, reference may also be made to **Shrilekha Vidyarthi v State of U.P.,**[72] (for short, **Shrilekha Vidyarthi**), wherein it was held: (AIR para 36)

> The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you ever so high, the laws are above you'. This is what men in power must remember, always.

In **Mahesh Chandra v Regional Manager, U.P.Financial Corporation**[73], the Supreme Court held: (AIR para 15)

> Every wide power, the exercise of which has far-reaching repercussion, has inherent limitation on it. It should be exercised to effectuate the purpose of the Act. In legislations enacted for general benefit and common good the responsibility is far graver. It demands purposeful approach. The exercise of discretion should be objective. Test of reasonableness is more strict. The public functionaries should be duty conscious rather than power charged. Its actions and decisions which touch the common man have to be tested on the touchstone of fairness and justice. That which is not fair and just is unreasonable. And what is unreasonable is arbitrary. An arbitrary action is ultra vires. It does not become bona fide and in good faith merely because no personal gain or benefit to the person exercising discretion should be established. An action is mala fide if it is contrary to the purpose for which it was authorized to be exercised. Dishonesty in discharge of duty vitiates the action without anything more. An action is bad even without proof of motive of dishonesty, if the authority is found to have acted contrary to reason.

That brings us to the third stage of development in "Article 14 Law". This position is peculiar to Indian Constitution. In **Sanjeev Coke Manufacturing Company v M/s.Bharat Coking Coal Limited**[74], the Supreme Court declared that when a Law has express declaration that it is intended for giving effect to the principles specified in Articles 39(b) and (c), the ground based on Article 14 cannot be pressed into service to invalidate legislative action. This is, however, subject to Court holding that such legislation is indeed aimed at achieve purpose under Articles 39(b) and (c). Thus, from the stage of classification theory through the period of minimum rationality, the law under Article 14 has evolved to such a stage that every facet of State action can be tested under Article 14. Keeping this background, we may now briefly indicate the principles of judicial review to show the stage or stages at which strict scrutiny test should be applied while testing the

policy of affirmative action.

In a series of decisions, the power of judicial review and its scope has been explained. It is not necessary to copiously quote from these Judgments. The basic rules of judicial review were explained by Court of Appeal in England in **Council of Civil Service Unions v Minister for Civil Service**[75] (GCHQ case). GCHQ grounds of judicial review, namely, illegality, irrationality and impropriety are also grounds in Indian Administrative Law as approved by the Supreme Court in **Tata Cellular v Union of India**[76] (for short, **Tata Cellular**).

In Indian context, judicial review operates in different areas. We have (i) judicial review of constituent power of the Parliament to amend the Constitution; (ii) judicial review of State and Union Legislation; (iii) judicial review of delegated legislation; (iv) judicial review of administrative action; (v) judicial review of quasi judicial decisions of administrative authorities and (vi) judicial review of decisions of statutory tribunals dealing with service, revenue and tax cases. As is well settled, judicial review differs from situation to situation depending on the subject matter of challenge.

Whether same grounds of judicial review are applicable for reviewing State/Parliamentary Legislation as well? While placing reliance on the decision of the Supreme Court in **State of Andhra Pradesh v MCDowell Company**[77] (for short, **MCDowell**), the learned Advocate General made an attempt to contend that when the legislation aiming at affirmative action is challenged, the grounds of judicial review in relation to administrative action cannot be pressed into service and that the Court should be primarily concerned with legislative competency of the State and the question of unconstitutionality of the impugned legislation on the ground it violates fundamental rights or other constitutional provisions. We are afraid, this is a misconception. In **S.R.Bommai v Union of India**[78] (for short, **S.R.Bommai**), a nine-Judge Bench of the Supreme Court considered and interpreted Article 356 of Constitution of India which empowers the President of India to impose President's Rule, by dissolving elected legislative House of the State. A submission was made on behalf of Union of India that there is a difference in the nature and scope of the power of judicial review in Administrative Law and Constitutional Law and that the judicial review has no scope in Constitutional Law beyond examining the infringement of fundamental rights. Sawant,J (majority opinion) rejected the contention observing thus

> We are afraid that this contention is too broad to be accepted. The implication of this contention, among others, is that even if the Constitution provides pre-conditions for exercise of power by the constitutional authorities, the Courts cannot examine whether the pre-conditions have been satisfied. Secondly, if the powers are entrusted to a constitutional authority for achieving a particular purpose and if the concerned authority under the guise of attaining the said purpose, uses the powers to attain an impermissible object, such use of power cannot be questioned. We have not been pointed out any authority in support of these propositions. We also find that **many of the parameters of judicial review developed in the field of administrative law are not antithetical to the field of constitutional law, and they can equally apply to the domain covered by the constitutional law. That is also true of the doctrine of proportionality.**
>
> (emphasis supplied)

Constitutional law regulates the structure of the principal organs of Government, the relationship to each other and to the citizen and determines main powers and functions[79]. Ivor Jennings in his book 'The Law and Constitution' defines Administrative Law as branch of Public Law which is concerned with the composition, powers, duties, rights and liabilities of various organs of Government which are engaged in administrative are more precisely the Law relating to Public Administration". Both branches are part of public law and judicial review is essentially governed by public law principles. The Court, on a proper challenge, can strike down the legislation on two grounds, namely, lack of legislative competence and violation of fundamental rights guaranteed under Part III of the Constitution or for violation of other constitutional provisions. Jeevan Reddy,J who wrote the Judgment in **MCDowell** observed as under. (AIR para 43)

> … In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invaliding an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The Court cannot sit in judgment over their wisdom… It is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the Court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted.

Therefore, when a legislation is challenged on the ground that the State lacks competency, the Court has to insist upon strict scrutiny test, for any legislation by the Parliament or the State must be with reference to specific powers conferred in relation to legislative entries in VII Schedule to Constitution and a legislation beyond the powers would be rendered void and unenforceable. If the source of power is not any legislative entry in the three lists in the VII Schedule of the Constitution, such power must be traceable to specific constitutional provision and there should be pre-existing conditions for exercising such constitutional power under a specific provision. (See **In Re Cauvery Water Disputes Tribunal**)[80]. If the State fails to show a specific entry or specific provision within the parameters of well settled constitutional interpretation of legislative powers, such law must fail on strict scrutiny. In either of these two cases, the Court has to call upon the State to strictly prove the existence of power and that such exercise of power does not encroach upon the powers reserved for other legislative organ be it either Parliament or State Legislature and vice versa. This is of course subject to doctrine of constitutionality of legislation.

In the case of a challenge of legislation as violating fundamental rights or other constitutional provisions, again judicial review should be applied strictly in the sense that State has not violated any of the fundamental rights or has not contravened any constitutional provision in making the legislation. We may

elaborate this further. If a legislation is challenged as violating Article 14 of Constitution of India (for that matter Articles 15 and 16), it is for the State to show that the classification satisfies the axiomatic twin tests of rationality and nexus. Be it noted that burden lies on the State that classification by legislation survives the tests of Article 14 (See **D.S.Nakkara v Union of India**)[81]. If a legislation is challenged as violating any of the freedoms under Article 19 of Constitution of India, it is the State that has to show that the restrictions on Article 19 freedoms are reasonable in the interest of community (See **Sagir Ahmed v State of Uttar Pradesh**[82], **Vrijlal v State of Madhya Pradesh**[83] and **Indra Sawhney-II**). If any legislation or executive action is assailed as violating Article 21, heavy burden lies on State to sustain its action by showing 'life and liberty' are being affected in accordance with law which is not capricious and irrational (See **E.P.Royappa, Maneka Gandhi** and **Mithu v State of Punjab**[84]). If the legislation is impeached as violating religious rights, again the Law maker has to plead and prove that restrictions on freedom of religion are intended to safeguard public order, morality and health. If a legislation is challenged as violating minority rights under Article 30 of Constitution of India, it is for the State to prove that such restrictions are permissible having regard to the larger interests of the minority as well as majority community with reference to general standards of education etc (See **Islamic Academy**). Here also the Court would be applying strict scrutiny assuming primary role. The Court would insist upon the State to justify the deviation from the normative rule by producing necessary material or evidence justifying its action.

As we presently show in the field of Administrative Law after the decision of House of Lords in **R v Secretary of State for the Home Dept., ex p Brind**[85], English Courts assumed primary role whenever complaints of violation of European Convention of Human Rights (Convention Rights) are brought to the Court for review. The Court then would not adopt a passive role leaving to the decision maker liberty in the matter of gathering evidence, analyzing the evidence and coming to conclusion leading to a decision. The Court then would have to apply primary review on strict scrutiny test, to see whether Convention Rights are denied to plaintiff.

Till decision of the House of Lords in Brind case, the judicial review in the matter of exercising discretion was governed by the principles laid down by Lord Greene in **Associated Provincial Picture Houses Limited v Wednesbury Corporation** (supra). In this case, Wednesbury Corporation while granting permission to Associated Picture House for exhibiting cinematography films imposed condition that children under the age of fifteen years shall not be admitted to any entertainment. The plaintiff sought a declaration that such condition is *ultra vires* Entertainments Act, 1932. Before the Court of Appeal it was *inter alia* argued that such a condition was unreasonable and therefore *ultra vires*. Lord Greene, M.R., after considering the relevant precedents explained the word "unreasonable" in the following manner.

> Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty- those, of course, stand by themselves-unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration. In the present case we have heard a great deal about the meaning of the word "unreasonable." It is true the

> discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. WARRINGTON,L.J., I think it was, gave the example of red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith.

The above principle is attained immortality in the field of Administrative Law as Principle of "Wednesbury unreasonableness" which is equated to "arbitrariness or irrationality" as a ground of attack upon executive action or legislative action (See **Tata Cellular** and **Om Kumar v Union of India**[86], for short **Om Kumar**). I n **Om Kumar**, Supreme Court opined that Wednesbury Principles apply when State action is questioned as arbitrary. When legislative action is challenged as being incompetent or violative of fundamental rights, the Court has to assume a primary role. In such primary judicial review, the test invariably is strict scrutiny test which, as explained by Jagannadha Rao,J in **Omkar** as 'proportionality' (SCC para 28) as below.

> By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality.

There is, however, an area where strict scrutiny is not required. Before dealing with this aspect, we may notice that the power of judicial review has certain limitations. In **State of U.P., v Johri Mal**[87], the Supreme Court dealing with this aspect observed as under: (SCC para 28)

> The scope and extent of power of the judicial review of the High Court contained in Article 226 of the Constitution of India would vary from case to case, the nature of the order, the relevant statute as also the other relevant factors including the nature of power exercised by the public authorities, namely, whether the power is statutory, quasi-judicial or administrative. The power of judicial review is not intended to assume a supervisory role or don the robes of the omnipresent. The power is not intended either to review governance under the rule

of law nor do the courts step into the areas exclusively reserved by the suprema lex to the other organs of the State. Decisions and actions which do not have adjudicative disposition may not strictly fall for consideration before a judicial review court. The limited scope of judicial review, succinctly put, is:

(i) Courts, while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies.

(ii) A petition for a judicial review would lie only on certain well-defined grounds.

(iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself is perverse or illegal.

(iv) A mere wrong decision without anything more is not enough to attract the power of judicial review; the supervisory jurisdiction conferred on a court is limited to seeing that the Tribunal functions within the limits of its authority and that its decisions do not occasion miscarriage of justice.

(v) The courts cannot be called upon to undertake the government duties and functions. The court shall not ordinarily interfere with a policy decision of the State. Social and economic belief of a judge should not be invoked as a substitute for the judgment of the legislative bodies. (See **Ira Munn v State of Illinois**[88]).

It is also well settled that judicial review looks at decision making process than decision itself (See **Chief Constable of the North Wales Police v Evans**[89]). When a decision maker is required to evaluate the facts and apply the principles of law, even if a second view is possible in regard to the evaluation of facts, the Court of judicial review would not interfere nor the Court is entitled to apply the law to the facts as assessed by it. If two views about facts are possible, Court would not, ordinarily substitute its view to that of decision maker. When any State action is challenged as arbitrary or capricious which only means irrational, Wednesbury principle is applied in which case ordinarily the Court would consider the facts determined by the authority as final. In such a case, the Court has to apply Wednesbury principle adopting deferential or intermediate standard of scrutiny. This is what is described as secondary review. So to say, whenever there is a complaint of violation of Article 14 (Articles 15 and 16 as well) primary review applies which means the impugned action has to be analysed subjecting to strict scrutiny. When State action is challenged as aribitrary or irrational, secondary review following Wednesbury principle applies. Dealing with this aspect, Jagannadhara Rao,J after noticing **Adarand Constructors-I** and **Ajit Singh v State of Punjab**[90], summarised this dual review principles in **Om Kumar** as under. (SCC paras 66 and 67)

> It is clear from the above discussion that in India where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the Constitutional Courts as primary reviewing courts to consider correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. Here the court deals with the merits of the balancing action of the administrator and is, in essence, applying “proportionality” and is a primary reviewing authority…

But where an administrative action is challenged as "arbitrary" under Article 14 on the basis of **Royappa** (supra) (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is "rational" or "reasonable" and the test then is the Wednesbury test. The courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. (In **G.B.Mahajan v Jalgoan Municipal Council**[91] of SCC at p.111). VenkatachaliahJ (as he then was) pointed out that "reasonableness" of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of Wednesbury rules. I n **Tata Cellular v Union of India** (supra) (SCC at pp.679-80), **Indian Express Newspapers Bombay (P) Ltd., v Union of India**[92] (SCC at p.691), **Supreme Court Employees' Welfare Association v Union of India**[93] (SCC at p.241) and **U.P.Financial Corporation v Gem Cap (India) (P) Limited**[94] (SCC at p.307) while judging whether the administrative action is "arbitrary" under Article 14 (i.e. otherwise then being discriminatory), this Court has confined itself to a Wednesbury review always.

Before we go to the next part of the Judgment, we conclude this point as follows. When challenge to the impugned Ordinance is based on violation of Articles 14, 15(4) and 16(4) of Constitution of India, the Court has to apply strict scrutiny test in which case the burden is on the State to prove that conditions exist to declare entire Muslim community as backward class and that special provision for them does not seriously offend equality principle and equal protection of laws. The burden is on the State to prove before this Court by producing necessary acceptable evidence. If State relies on the report of the B.C.Commission as basis for impugned Ordinance, the State has to justify the conclusions of B.C.Commission. If the State fails in strict scrutiny test, the consequences would have to follow. In so far as the challenge of the petitioners that the report of the B.C.Commission and impugned Ordinance is arbitrary and irrational, the Court would apply secondary review in which case intermediate scrutiny or deferential scrutiny would be suffice.

4. QUESTION OF MUSLIMS AS BACKWARD CLASS

Whether "backward class of citizens" in Article 16(4) and 15(4) includes Muslim community as well? Learned Senior Counsel Mr.Ravi Varma Kumar, appearing for the petitioners in W.P.No.14338 of 2005 raised this question. The question raised is arguable point and therefore cannot be ignored. Further the question raised by him is also supported by the observations made in **Venkataramana v State of Madras**[95] (for short, **Venkataramana**), which is a decision by seven Judge Constitution Bench of Supreme Court. Reliance is also placed on observations made by the Supreme Court in other cases. The argument of the learned counsel for the petitioners is as follows. When Article 10(3) in Draft Constitution was introduced in the Constituent Assembly, the Drafting Committee as well as the Constituent Assembly were aware of the pernicious practices in the

caste system of Hindu society in which persons belonging to certain castes were not having equal opportunities to compete with those persons belonging to forward castes or upper castes like Brahmins, Kshatriyas and Vysyas. Therefore, the Constitution makers thought of providing a special provision for advancement of such Hindu backward castes, which historically suffered by reason of their forced backwardness. When Article 10(3) of the Draft Constitution was enacted as Article 16(4) what was intended was provision of reservation to members belonging only to those social groups who had been the victims of oppression and deprivation. He would also submit that Article 296 in Draft Constitution (enacted as Article 335 in the Constitution of India) contained a clause to make special provision for minorities and the same was subsequently amended in the Constituent Assembly by reason of Article 30, giving fundamental right to minorities. Therefore, Articles 15(4) and 16(4) of the Constitution of India are not intended to provide reservations for Muslim community. The argument as pointed out, is not only attractive but throws up a seminal question for consideration.

The learned Advocate General appearing for the State would contend that whether Muslim community can be considered for extending the constitutional concessions under Articles 15(4) and 16(4) of Constitution of India stands concluded by the decision of the Full Bench of this Court in **Muralidhar Rao** as well as **Indra Sawhney-I.** Therefore, according to him, even if the exercise is in relation to the whole community, the same is not rendered unconstitutional.

The question was considered in **Venkataramana** more than five decades ago. In that case, Madras Public Service Commission invited applications for eighty-three posts of District Munsifs in Madras Subordinate Civil Judicial Service. It was also notified that selection of candidates would be made from various castes, religions and communities as per a communal G.O. The petitioner Venkataramana was qualified for being selected to the post. He also secured sufficient marks for that but he was not selected. He filed writ petition under Article 32 of Constitution of India challenging the rule of communal rotation as being repugnant to the provisions of the Constitution and for a direction to consider his representation on merits without applying the rule of communal rotation. The Bench considered the question whether reservation of thirteen posts for backward Hindus was valid. Referring to Article 16(4) of Constitution of India, by unanimous judgment, it was held:

> Cl.(4) expressly permits the State to make provision for the reservation of appointments of posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services of the State. Reservation of posts in favour of any backward class of citizens cannot, therefore, be regarded as unconstitutional. The Communal G.O. itself makes an express reservation of seats for Harijans & Backward Hindus. The other categories, namely, Muslims, Christians, Non-Brahmin Hindus & Brahmins must be taken to have been treated as other than Harijans & Backward Hindus. Our attention was drawn to a schedule of Backward Classes set out in Sch.III to Part I of the Madras Provincial & Subordinate Service Rules. It was, therefore, argued that Backward Hindus would mean Hindus of any of the communities mentioned in that Schedule. **It is, in the circumstances, impossible to say that classes of people other than Harijans & Backward Hindus can be called Backward Classes.**
>
> (emphasis supplied)

The above observations would certainly supports the contention made by the learned Senior Counsel. Our attention is also invited to the speech of Dr.Ambedkar in the Constituent Assembly on 30.11.1948, when Draft Article 10 was taken up for consideration. The relevant portion of speech requires to be extracted. Before doing so, we may also refer to a portion of the speech of Mr.Mohamed Ismail Sahib, the Hon'ble Member from Madras[96].

> **Mr. Mohamed Ismail Sahib (Madras: Muslim):** Mr. Vice-President, Sir, this word 'backward' I cannot understand in the context in which it is put here in clause (3) of Article 10. If one reads the clause without this word, then one can quite clearly and easily understand its meaning. But when the word 'backward' is inserted, it obscures the meaning a great deal. The word 'backward' has not been defined at all anywhere in this Constitution. But I may tell you it has been defined in certain places. In Madras it has got a definite and technical meaning. There are a number of castes and sub-castes called backward communities. The Government of Madras have counted and scheduled more than 150 of these classes in that province and in that province when you utter the word 'backward', it is one of those 150 and odd communities that is meant, and not any community that is generally backward. And I may also say that those 150 and odd communities constitute almost the majority of the population of that Province, and every one of these communities comes from the Hindus-the majority community. In that list the scheduled castes are not included, and if you include the scheduled castes also in the class of those backward communities, then all of them put together, will form decidedly the majority of the whole population of that province. I want to know whether by inserting the word 'backward' here you mean the same backward classes as the Madras Government means. I want to know the meaning of the word. **I submit that it should not in any way be taken to mean that the backward classes as those of the minority communities such as Muslims, Christians and the scheduled caste people are excluded from the purview of this clause. As a matter of fact, there are backward people amongst the non-majority people as well. The Christians are backward. As a matter of fact they are not adequately represented in the services of the provinces. So also the Muslims, and also the Scheduled Castes. If any provision is made, it has to be made for such really backward people. It may be pointed out that such a provision is made in Article 296 under the minorities rights. But there the Article does not speak of the reservation for those people in the services as this clause (3) does. Therefore, it is here, and that in the fundamental rights that such a provision ought to be made for such minorities as the Muslims, Christians and the Scheduled Castes.**
>
> Then sir, I am opposed to the amendment moved by Pandit Kunzru. He says that the Government shall have the right or option of providing for reservation only for a period of ten years. Sir, the measure or yardstick in any such matter should not be the period of time. The backwardness of the people is the result of conditions which have been persisting and inexistence for several centuries and ages, and these will not die off easily. So the measure really should be the steps that are being taken to liquidate that backward condition, and it should be the forwardness of the people which has resulted as a

consequence of those steps. Therefore, when these people advance and have come forward as much as any other community in the land, then these very reservations would automatically disappear. I feel that no period need be stipulated at all for this purpose. That period might be less than ten years, or it maybe more than ten years, according as the backwardness persists or disappears. The measure, as I said, should be the effect and result of the steps that are being taken for removing and eliminating those conditions which go to make the backwardness. **I would now request the mover of the motion to at least remove the word 'backward' and make it clear to the House that here, when the clause speaks of reservation, it means also minority communities, who stand in need of such reservations.**

(emphasis supplied)

From the above speech, it is very clear that the Constituent Assembly understood Draft Article 10(3) enabling the State to provide special provision for backward classes among Hindu community. That is the reason why a motion was moved to remove the word "backward" and make a clear provision to include, minority communities also. The motion was not accepted though. Further, Dr.Ambedkar concluding the debate on Article 10(3) spoke in the following manner[97].

Now, Sir, to come to the other question which has been agitating the members of this House, viz., the use of the word 'backward" in clause (3) of Article 10, I should like to begin by making some general observations so that members might be in a position to understand the exact import, the significance and the necessity for using the word "backward" in this particular clause. If members were to try and exchange their views on this subject, they will find that there are three points of view which it is necessary for us to reconcile if we are to produce a workable proposition which will be accepted by all. Of the three points of view, the first is that there shall be equality of opportunity for all citizens. It is the desire of many Members of this House that every individual who is qualified for a particular post should be free to apply for that post, to sit for examinations and to have his qualifications tested so as to determine whether he is fit for the post or not and that there ought to be no limitations, there ought to be no hindrance in the operation of this principle of equality of opportunity. Another view mostly shared by a section of the House is that, if this principle is to be operative - and it ought to be operative in their judgment to its fullest extent - there ought to be no reservations of any sort for any class or community at all, that all citizens, if they are qualified, should be placed on the same footing of equality so far as the public services are concerned. That is the second point of view we have. Then we have quite a massive opinion which insists that although theoretically it is good to have the principle that there shall be equality of opportunity, there must at the same time be a provision made for the entry of certain communities which have so far been outside the administration. As I said, the Drafting Committee had to produce a formula which would reconcile these three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a 'proper look-in' so to say into the administration. If Honourable Members will bear these facts in mind - the three principles, we had to reconcile, - they will see that no better formula could be produced than the one that is embodied in sub-clause (3) of

Article 10 of the Constitution; they will find that the view of those who believe and hold that there shall be equality of opportunity, has been embodied in sub-clause (1) of Article 10. It is a generic principle. At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now - for historical reasons - been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services. Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation. If Honourable Members understand this position that we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as "backward" the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the responsibility of introducing the word "backward" which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly. But I think Honourable Members will realise that the Drafting Committee which has been ridiculed on more than one ground for producing sometimes a loose draft, sometimes something which is not appropriate and so on, might have opened itself to further attack that they produced a Draft Constitution in which the exception was so large, that it left no room for the rule to operate. I think this is sufficient to justify why the word "backward" has been used.

With regard to the minorities, there is a special reference to that in Article 296, where it has been laid down that some provision will be made with regard to the minorities. Of course, we did not lay down any proportion. That is quite clear from the section itself, but we have not altogether omitted the minorities from consideration. Somebody asked me: "What is a backward community"? Well, I think any one who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government. My Honourable Friend Mr T.T.Krishnamachari asked me whether this rule will be justiciable. It is rather difficult to give a dogmatic answer. Personally I think it would be a justiciable matter. If the local Government included in this category of reservations such a large number of seats: I think one

> could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the Court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner. Mr. Krishnamachari asked; "who is a reasonable man and who is a prudent man? These are matters of litigation". Of course, they are matters of litigation, but my Honourable Friend, Mr. Krishnamachari will understand that the words "reasonable persons and prudent persons" have been used in very many laws and if he will refer only to the Transfer of Property Act, he will find that in very many cases the words "a reasonable person and a prudent person" have very well been defined and the Court will not find any difficulty in defining it. I hope, therefore that the amendments which I have accepted, will be accepted by the House.
>
> (emphasis supplied)

It can be inferred from the above speech that Article 16(4) of Constitution of India was not intended nor targeted at backward classes among minority communities. Keeping this in view, we may now refer to a few decisions of the Supreme Court touching this aspect of the matter. The term 'backward class' refers to a homogeneous and endogamous group of persons bound by a social code of conduct peculiar to them and social mores. The homogeneity of the group or a caste has four essential features which maintains character, namely, hierarchy; commensality; restrictions on marriage and hereditary occupation. Most of these homogeneous classes or castes in Hindu society are endogamous groups adhered to intra marriages and prohibiting inter marriages between two groups. The members of homogeneous class are expected to maintain a "way of cultural life" and certain pattern in their dealings with non-members of the class (**Vasanth Kumar** AIR para 22). In **Sagar**, the Supreme Court explained the expression "class" in Article 15(4) of Constitution of India, as under (AIR para 6).

> In the context in which it occurs the expression "class" means a homogenous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of a class a test solely based upon the caste or community cannot also be accepted.

Unless and until a class or community for that matter religious groups is characterized as endogamous group, having homogeneous features, the said class/community or religious group does not qualify for being backward class of citizens. That Muslim community is not homogeneous, is no more open to debate in view of the decisions of the Supreme Court. It is a misconception to treat Muslim community as a homogeneous class. Except in regard to core religious and theological beliefs, Muslim community also by and large nurtures caste system in India. Mr.T.Suryakaran Reddy, counsel for petitioners in W.P.No.13898 of 2005 placed reliance on 'Encyclopaedia of World Muslims:Tribes, Castes and Communities'; (by N.K.Singh and A.M.Khan, Vol I) to drive home the point. According to learned authors of the said Encyclopaedia, there are 84 classes/castes in Muslim community in Andhra Pradesh. The Encyclopaedia also gives geographical distribution of each group and their occupations. It is

interesting to note that the authors give an impressive bibliography after describing each Muslim class/community in some cases by referring to certain works dating back to more than a century. The National Commission for backward classes in its report submitted to Central Government on 04.07.2002 refers to twenty-four existing Muslim castes/communities which are also found in the Encyclopaedia of World Muslims referred to hereinabove. It is interesting to point out that National Commission relied on 'India's Communities' (People of India series) published by Anthropological Survey of India. The B.C.Commission totally ignored the existence of castes and communities and proceeded as if entire Muslim community is a homogenous group without any visible divisions among the community. The entire approach is therefore suffers from a fundamental flaw.

Our attention has also been drawn to paragraphs 474 to 478 from the Judgment of Sawant,J in **Indra Sawhney-I.** His Lordships devoted the following paragraphs while dealing with this aspect.

> **It is further not correct to say that the caste system is prevalent only among the Hindus, and other religions are free from it. …As far as Islam is concerned, Islam also does not recognize castes or caste system. However, among the Muslims, in fact there are Ashrafs and Ajlafs, i.e., high born and low born.** The Census Report of 1901 of the Province of Bengal records the following facts regarding the Muslims of the then Province of Bengal:
>
> "The conventional division of the Mahomedans into four tribes – Sheikh, Saiad, Moghul and Pathan – has very little application to this Province (Bengal). The Mahomedans themselves recognize two main social divisions, (1) Ashraf or Sharaf and (2) Ajlaf. Ashraf means 'noble' and includes all undoubted descendants of foreigners and converts from high caste Hindus. All other Mahomedans including the occupational groups and all converts of lower ranks, are known by the contemptuous terms, 'Ajlaf', 'Wretches' or 'mean people': they are also called Kamina or Itar, 'base' or Rasil, a corruption of Rizal 'worthless'. In some places a third class, called Arzal or 'lowest of all', is added. With them no other Mahomedan would associate and they are forbidden to enter the mosque or to use the public burial ground.
>
> Within these groups there (sic) castes with social precedence of exactly the same nature as one finds among the Hindus.
>
> 1. Ashraf or better class Mahomedans:
>
> (i) Saiads, (ii) Sheikhs, (iii) Pathans, (iv) Moghul, (v) Mallik, (vi) Mirza.
>
> 2. Ajlaf or lower class Mahomedans:
>
> (i) Cultivating Sheikhs, and other who were originally Hindus but who do not belong to any functional group, and have not gained admittance to the Ashraf Community e.g. Pirali and Thakrai, (ii) Darzi, Jolaha, Fakir and Rangrez, (iii) Barhi, Bhathiara, Chik, Churihar, Dai, Dhawa, Dhunia, Gaddi, Kala, Kasai, Kula, Kunjara, Laheri, Mahifarosh, Mallah, Naliya, Nikari, (iv) Adbad, Bako Bediya, Bhat, Chamba, Dafali, Dhobi, Hajjam, Mucho, Nagarchi, Nat, Panwaria, Madaria, Tuntia.
>
> 3. Arzal or degraded class:
>
> Bhanar, Halakhor, Hirja, Kashi, Lalbegi, Mangta, Mehtar.

The Census Superintendent mentions another feature of the Muslim social system, namely, the prevalence of the 'Panchayat system'. He states:

'The authority of the Panchayat extends to social as well as trade matters and... marriage with people of other communities is one of the offences of which the governing body takes cognizance. The result is that **these groups are often as strictly endogamous as Hindu castes. The prohibition on inter-marriage extends to higher as well as to lower castes, and a Dhuma, for example, may marry no one but a Dhuma. If this rule is transgressed, the offender is at once hauled up before the panchayat and ejected ignominiously from his community. A member of one such group cannot ordinarily gain admission to another, and he retains the designation of the community in which he was born even if he abandons its distinctive occupation and takes to other means of livelihood.** Thousands of Jolahas are butchers, yet they are still known as Jolahas.'

(See pp.218-220 of Pakistan or Partition of India by Dr.B.R.Ambedkar.)"

Similar facts regarding the then other Provinces could be gathered from their respective Census Reports. **At present there are many social groups among Muslims which are included in the list of Scheduled Castes in some States. For example, in Tamil Nadu, Labbais including Rawthars and Marakayars are in the list of Scheduled Castes. This shows that the Muslims in India have not been remained immune from the same social evils as are prevalent among the Hindus.....**

The division of the society even among the other religious groups in this country between the high and low castes is only to be expected. Almost all followers of the non-Hindu religions except those of the Zoroastrianism, are converts from Hindu religion, and in the new religion they carried with them their castes as well. It is unnatural to expect that the social prejudices and biases, and the notions and feelings of superiority and inferiority, nurtured for centuries together, would disappear by a mere change of religion.

The castes were inextricably associated with occupations and the low and the mean occupations belonged to the lower castes. In the new religion, along with the castes, most of the converts carried their occupations as well. **The backward classes among the Hindus and non-Hindus can, therefore, easily be identified by their occupations also. Whether, therefore, the backward classes are identified on the basis of castes or occupations, the result would be the same. For, it will lead to the identification of the same collectivities or communities. The social groups following different occupations are known among Hindus by the castes named after the occupations, and among non-Hindus by occupation names. Hence for identifying the backward classes among the non-Hindus, their occupations can furnish a valid test.** It is for this reason that both Articles 15(4) and 16(4) do not use the word 'caste' and use the word 'class' which can take within its fold both the caste and occupational groups among the Hindus and non-Hindus.

(emphasis supplied)

A reading of AIR paras 77 to 79 (AIR) in the opinion of Chinnappa Reddy,J in **Vasanth Kumar** would suggest that the expression 'backward class of citizens" in Article 16(4) is only with reference to Hindu backward classes, which in some cases might be Hindu backward castes. Jeevan Reddy,J in **Indra Sawhney-I** also agreed with such view when his Lordship observed that, "the concept of caste is not confined castes among Hindus and it extends to castes wherever they obtained as a fact irrespective of religious sanction for such practice". (SCC para 782).

As noticed the learned Advocate General placed strong reliance on **Muralidhar Rao**, a decision of this Court by co-equal Bench. Reference is made especially to the opinion of Sudershan Reddy,J to contend that the entire Muslim community can be provided reservations under Articles 15(4) and 16(4) of Constitution of India. As we presently show this may not be totally correct. The learned Judge framed a specific question as to whether the Muslims as a group are entitled to affirmative action/social reservation within the constitutional dispensation. After referring to **Indra Sawhney-I**, the learned Judge concluded as under. (ALD paras 108 to 110 in **Muralidhar Rao**)

> Non-Hindu religions like Islam, Christianity, and Sikh, do not recognize caste as such, but the existence of caste like social stratification among the Muslims is well recognized that in spite of egalitarian philosophy of Islam, which opposes all kinds of discriminations, almost all types of caste groups have emerged in the Muslims. The Muslims have developed different caste-groups at different places, but they call themselves as *Jamat or Biradari* and do not use the term *Jat or caste e.g.* Nadaf or Mansoori Jamat or Biradari, but in actual practice, they possess practically all the traits of caste structure such as endogamy, stratification, occupational, monopoly, dress-code and their own different Mosques.
>
> I n **Indra Sawhney's case** (1 Surpa) while referring to the speeches of Dr. B.R. Ambedkar in the Constituent Assembly it was noted that through out his speech in the Constituent Assembly, he was using the word "communities" (and not 'castes') which expression includes not only the castes among the Hindus but several other groups. The word "*community*" is clearly wider than "caste" – and "backward communities" means not only the castes – wherever they may be found – but also other groups, classes and sections among the populace. That is why the expressions "castes" or "caste" were not used under Article 15(4) and 16(4) but the word "class" which includes all communities, other groups, classes and sections among the populace was used.
>
> Therefore, sections/groups among the Muslim community or the Muslim community itself can be identified as a socially and educationally backward class for the purpose of Article 15(4) and as backward class of citizens for the purpose of Article 16(4) provided they satisfy the test of social backwardness.

The learned Judge considered the question along with another as to what expression "socially and educationally backward classes" in Article 15(4) and the expression "backward class of citizens" in Article 16(4) mean. Both the issues were taken up together and dealt with in paras 94 to 111. Whether backward classes can be identified on the basis and with reference to caste, if so what is the criteria for identifying the non-Hindu communities as backward class? This was a

second question considered by the Full Bench. Again, "on a close analysis of judgment of the Supreme Court in **Indra Sawhney-I**", while observing that "authority appointed to identify (backward classes) is free to adopt such approach and procedure as it thinks fit; concluded that so long as the approach adopted by it is fair and adequate, the Courts may not interfere in the matter", the Bench concluded thus:

> It is now well settled that the caste was always recognized as a social class/a socially homogeneous class. If a particular caste, as a whole is socially and educationally backward, reservations can be made in favour of such a caste on the ground that it is socially and educationally backward class. But that does not necessarily mean that the caste can be the sole consideration. But in some cases, social backwardness may readily be identifiable with reference to caste.
>
> In case of non-Hindus, social backwardness cannot obviously be identified for the purpose of recognizing as a class on the basis of caste in the conventional sense known to Hindu society. In all such cases, the part played by the occupation, conventional belief and place of habitation coupled with poverty may play a dominant and significant role in determining the social backwardness. But in either case, identification of backward classes cannot be based solely and exclusively on the basis of caste.

Chelameswar,J in a separate Judgment referred to **Balaji** and **Indra Sawhney-I** and concluded that there cannot be any legal infirmity in identifying a group or section of people by the profession or calling or the religion they follow. Agreeing with Sudershan Reddy and Chelameswar,JJ; Ghulam Mohammed,J gave a separate opinion. The learned Judge referred to passages from the opinions of Ratnavel Pandian, R.M.Sahay, and Jeevan Reddy,JJ and answered the issue as under.

> The Apex Court thus observed that the authority may take up the Muslim Community, after excluding those sections, castes and groups, if any, who have already been considered, and find out whether it can be characterized as a backward class in the State. Identifying a section of society on the basis of the religion they follow is only an identification of class of citizens. Considering the circumstances, I am of the view that such an exercise is justified and there is no impediment to hold that Muslims are entitled to the affirmative action and I am fortified by the observations and the view taken by the Supreme Court in INDRA SAWHNEY case (1 supra) referred above. The issue is answered accordingly.

We now notice decisions of Supreme Court on the question. In **Balaji**, the unanimous Constitution Bench dealt with the question – though it did not directly fell for consideration; in the following manner. (AIR para 23)

> Besides, if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, that test would inevitably break down in relation to many sections of Indian society which do not recognise castes in the conventional sense known to Hindu society. How is one going to decide whether Muslims, Christians or Jains, or even Lingayats are socially backward or not? The test of castes would be inapplicable to those groups, but that would hardly justify the exclusion of these groups in toto from the operation of Art. 15(4). It is not unlikely that in some States some

> Muslims or Christians or Jains forming groups may be socially backward. That is why we think that though castes in relation to Hindu may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or the dominant test in that behalf. Social backwardness is on the ultimate analysis the result of poverty to a very large extent. The classes of citizens who are deplorably poor automatically become socially backward. They do not enjoy a status in society and have, therefore, to be content to take a backward seat. It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens.

It was also observed that, "the occupations of citizens may also contribute to make classes of citizens socially backward, that there are some occupations which are treated as inferior according to conventional beliefs and citizens who follow these occupations are apt to become socially backward".

We may again refer to AIR para 110 in **Vasanth Kumar**, which reads:

> An examination of the question in the background of the Indian social conditions shows that the expression 'backward classes' used in the Constitution referred only to those who were born in particular castes,: or who belonged to particular races or tribes or religious minorities which were backward.

This aspect was considered by majority in **Indra Sawhney-I** as below (SCC para 782)

> If so, one can well begin with castes, which represent explicit identifiable social classes/groupings, more particularly when Article 16(4) seeks to ameliorate social backwardness. What is unconstitutional with it, more so when caste, occupation poverty and social backwardness are so closely intertwined in our society? [Individual survey is out of question, since Article 16(4) speaks of class protection and not individual protection]. This does not mean that one can wind up the process of identification with the castes. Besides castes (whether found among Hindus or others) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens. For example, in a particular State, Muslim community as a whole may be found socially backward. (As a matter of fact, they are so treated in the State of Karnataka as well as in the State of Kerala by their respective State governments). Similarly, certain Sections and denominations among Christians in Kerala who were included among backward communities notified in the former princely State of Travancore as far back as in 1935 may also be surveyed and so on and so forth. Any authority entrusted with the task of identifying backward classes may well start with the castes. It can take caste 'A', apply the criteria of backwardness evolved by it to that caste and determine whether it qualifies as a backward class or not. If it does qualify, what emerges is a backward class, for the purposes of clause (4) of Article 16. **The concept of 'caste' in this behalf is not confined to castes among Hindus. It extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice. Having exhausted the castes or simultaneously with it, the authority may take up for**

consideration other occupational groups, communities and classes. For example, it may take up the Muslim community (after excluding those sections, castes and groups, if any, who have already been considered) and find out whether it can be characterized as a backward class in that State or region, as the case may be. The approach may differ from State to State since the conditions in each State may differ. Nay, even within a State, conditions may differ from region to region. Similarly, Christians may also be considered. If in a given place, like Kerala, there are several denominations, sections or divisions, each of these groups may separately be considered. In this manner, all the classes among the populace will be covered and that is the central idea. The effort should be to consider all the available groups, sections and classes of society in whichever order one proceeds. Since caste represents an existing, identifiable, social group spread over an overwhelming majority of the country's population, we say one may well begin with castes, if one so chooses, and then go to other groups, sections and classes.

(emphasis supplied)

It may be noticed that the Supreme Court framed eleven questions for consideration. Question Nos.3, 4 and 5 read as under.

3. (a) What does the expression 'backward class of citizens' in Article 16(4) means?
   (b) Whether backward classes can be identified on the basis and with reference to caste alone?
   (c) Whether a class, to be designated as a backward class, should be situated similarly to the SCs/STs?
   (d) Whether the 'means' test can be applied in the course of identification of backward classes? And if the answer is yes, whether providing such a test is obligatory?

4. (a) Whether the backward classes can be identified only and exclusively with references to economic criteria?
   (b) Whether a criteria like occupation-cum-income without reference to caste altogether, can be evolved for identifying the backward classes?

5. Whether the backward classes can be further categorized into backward and more backward categories?

Discussion on question No.3 is spread over from paragraphs 746 to 797. The summary of the discussion on question No.3 is found in para 796-797 (SCC). We may again, for ready reference, quote relevant portions.

> (a). A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Articles 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical regions are socially backward. They too represent backward social collectivities for the purposes of Article 16(4)…. One can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfied the criteria. If it does – what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar

> process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one can well begin with it and then go to other groups, sections and classes….

A reading of the three opinions in **Muralidhar Rao** would show that the Court placed strong reliance on **Balaji, Vasanth Kumar** and **Indra Sawhney-I** to come to the conclusion that the entire Muslim community can be treated as backward class of citizens provided it is found to be socially backward for the purpose of Articles 15(4) and 16(4) of Constitution of India. Therefore, this Court analysed **Balaji, Vasanth Kumar** and **Indra Sawhney-I** more closely, while, not forgetting the fact that the question whether entire religious minority like Muslim Community group treated as backward class of citizens for the purpose of Constitution, did not arise directly for consideration before the apex Court or before this Court in **Muralidhar Rao**.

After an analysis of the observations made in **Balaji, Vasanth Kumar** and **Indra Sawhney-I**, we are of the considered opinion that whenever the Supreme Court made an observation as obiter to the effect that even persons belonging to Muslim community can be treated as backward, it was always with reference to groups or castes of Muslim community. In **Balaji**, it was held that caste cannot be made the dominant test in determining the social backwardness and the occupation of citizens may also contribute to backwardness. Such an observation is made in the context of considering the caste test to be applied among Hindus while determining backwardness keeping in view other communities like Muslims or Christians of Jains, who may be socially backward, in which case, caste may not be relevant. Even Venkataramiah,J in **Vasanth Kumar** observed that, "the expression of 'backward classes' used in the Constitution referred only to those who were born in particular caste or who belongs to a religious group or minority". Coming to the observations in para 782 and conclusions in SCC paras 796-797 in **Indra Sawhney-I**), Jeevan Reddy,J observed that, "in a particular State, Muslim community as a whole may be found socially backward", but His Lordship in the later portion of the said para observed that, "the effort should be to consider all the available groups, sections and classes of society". It was also observed that since caste represents existing identifiable social groups, one may begin with castes and then go to other groups, sections and classes. Even in para 797, it was observed that, "there are several occupational groups, sects and denominations among non-Hindus which for historical reasons are backward".

Constitution of India concerns not only with "we the people of India", but also endeavours to provide for welfare of Scheduled Castes and Scheduled Tribes (Articles 341, 342 and Articles 15, 16 and 46), Backward class of citizens (Articles 340, 15 and 16), Weaker Sections of the people (Article 46), Anglo Indians (Article 337) and Minorities (Articles 29 and 30). The Constitution also specifically mandates certain economic and political benefits for Anglo Indians (Article 337), Scheduled Castes and Scheduled Tribes (Articles 330 and 332) and confers a fundamental right on Minorities to establish and administer educational institutions of their choice. Only in respect of backward classes of citizens, the Constitution itself does not confer any right except enabling the President to appoint a Backward Class Commission to investigate the difficulties under which they labour and recommend ameliorative steps to be taken by the Union or the State; further it enables the State to provide for reservations to backward class of citizens under Articles 15(4) and 16(4) of the Constitution of India.

Venkataramiah,J in **Vasanth Kumar** considered the aspect of reservations for Anglo Indians. His Lordship noticed (see AIR paras 111 to 117), the history of making Articles 330 to 342 which initially were in part XIV entitled "Special Provisions relating to Minorities" and which ultimately came to be enacted as 'Special Provisions relating to certain Classes'. Then noticing Articles 330 to 342 including Article 337 (providing special benefits to Anglo Indians), his Lordship referred to the resolution moved by Pandit Jawaharlal Nehru in the Constituent Assembly on 13.12.1946 and explained the meaning of the expression of 'backward classes' found in Articles 15 and 16 as under. (AIR para 114)

> It is significant that the expression 'backward classes' used in Part XVI of the Constitution and in particular in Article 338(3) is used along with the Scheduled Castes, the Scheduled Tribes and the Anglo-Indian Community. In the original Draft Constitution, the Muslim community and the Indian Christian community also had been referred to in Part XIV. In the course of the debates, the question of the members of the Sikh community was also considered along with these communities. The meaning of backward classes has, therefore, to be deduced having regard to the other words preceding it. It is a rule of statutory construction that where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified. It is true that this rule which is called as the ejusdem generis rule or the rule noscitur a sociis cannot be carried too far. But it is reasonable to apply that rule where the specific words refer to a distinct genus or category. The Scheduled Castes are those castes, races and tribes or parts of or groups within the castes, races and tribes which are specified in the Public Notification issued by the President under Article 341(1). Similarly Scheduled Tribes are those tribes or tribal communities or parts of or groups of within tribes or tribal communities which are specified in the Public Notification issued by the President under Article 342(1). This is clear from the definitions of 'Scheduled Castes' and 'Scheduled Tribes' in Article 366(24) and Article 366(25). The notifications issued under Article 341 and Article 342 can be modified only by a law made by the Parliament (Vide Article 341(2) and Article 342(2). It is thus seen that Part XVI of the Constitution deals with certain concessions extended to certain castes, tribes and races which are Scheduled Castes and Scheduled Tribes and to the Anglo-Indian Community. **In the above context if Article 338(3) and Article 340 are construed, the expression 'backward classes' can only refer to certain castes, races, tribes or communities or parts**

thereof other than Scheduled Castes, Scheduled Tribes and the Anglo-Indian community, which are backward. This view also gains support from the resolution regarding the aims and objects of the Constitution moved by Pandit Jawaharlal Nehru in the Constituent Assembly on December 13, 1946.

(emphasis supplied)

Whether the above reasoning can also apply to say the expression 'backward classes' refers to caste, races, tribes or communities or parts thereof other than Minorities? This is a dilemma. The Constitution maintains delicate balance among various competing rights of various groups of people. Whether such delicate balance does not get disturbed if the State is given the blanket power to identify entire religious minority community as backward class of citizens? In **Muralidhar Rao**, as noticed above, this Court concluded that "sections/groups among Muslim community or the Muslim community itself can be identified as socially and educationally backward class for the purpose of Articles 15(4) and 16(4) of the Constitution of India provided they satisfy the test of social backwardness". This conclusion has to be understood in the light of the observations made in **Balaji, Vasanth Kumar** and **Indra Sawhney-I**.

We are, therefore, of considered opinion that while examining claims of various classes/groups or sects or denominations of Muslim community for the purpose of Articles 15(4) and 16(4) of Constitution of India, the endeavour of the State should be to identify only such of the classes/groups/castes among Muslim community who are backward. Muslim community as a whole cannot be treated as backward class though under certain extraordinary circumstances subject to satisfying the test of social backwardness the entire religious minority may be treated as backward class provided the entire community is engaged in a similar occupation (which is inferior or unclean or undignified) and majority of the Muslim community are economically, educationally and socially backward. If the entire Muslim community is identified as backward class ignoring the classes/groups/ denominations/sects among Muslim community, any policy of compensatory discrimination would be futile because as observed by Desai,J in **Vasanth Kumar**, the assumption that all members of some castes are equally socially and educationally backward is not well founded (AIR para 25) and if the entire religious minority is treated as backward class for the purpose of Articles 15(4) and 16(4) of Constitution of India, the "better placed" in the community would grab all the benefits of reservation.

5. B.C.COMMISSION REPORT

In assailing the report of B.C.Commission and impugned Ordinance, the learned counsel in chorus contend that Muslims as a class or purported homogenous religious group with common traits and common attributes cannot be characterized as socially backward. They would urge that unless and until a class of persons can be characterized as socially backward class, any amount of economic backwardness would not enable them to get benefits of affirmative action under Articles 15(4) and 16(4) of Constitution of India. They also contend that the impugned B.C.Commission report has failed to consider social backwardness of the Muslims and in the absence of such consideration, the report suffers from the defects of being perverse, unreasonable and irrational. According to the learned counsel, the criteria adopted by the B.C.Commission are unrelated to identification of Muslims as backward class.

It is now well settled that for the purpose of identifying backward classes, the Government can rely on the data collected from various sources, apply the relevant criteria by adopting a scientific and objective method and come to a conclusion that a particular class of citizens is backward class. After **Indra Sawhney-I**, however it has now become mandatory for the State to appoint Commission or Tribunal consisting of experts to do the exercise. When the State takes executive action or resorts to legislation for implementing the policy of affirmative action accepting the report of a Commission, the report itself can be subjected to judicial scrutiny if a challenge is made to the same. If report of the Commission is vitiated for any reasons, the consequential State action cannot survive judicial scrutiny. Such challenge is made before us. This principle of law found in the opinion of Sawant,J in **Indra Sawhney-I**. (SCC paras 529 and 530)

> The answer to the question lies in the question itself. There are no special principles of judicial review nor does the scope of judicial review expand when the identification of backward classes and the percentage of the reservation kept for them is called in question. **So long as correct criterion for the identification of the backward classes is applied, the result arrived at cannot be questioned on the ground that other valid criteria were also available for such identification.** It is possible that the result so arrived at may be defective marginally or in marginal number of cases. That does not invalidate the exercise itself. No method is perfect particularly when sociological findings are in issue. Hence, marginal defects when found may be cured in individual cases but the entire finding is not rendered invalid on that account.
>
> The corollary of the above is that **when the criterion applied for identifying the backward classes is either perverse or *per se* defective or unrelated to such identification in that it is not calculated to give the result or is calculated to give, by the very nature of the criterion, a contrary or unintended result, the criterion is open for judicial examination.**
>
> (emphasis supplied)

In the majority Judgment, it was held that “there is no particular or special standard of judicial scrutiny in matters arising under Articles 16(4) and 15(4)” and

that “the extent and scope of judicial scrutiny depends upon on the nature of the subject matter, the nature of the right affected, the character of legal and constitutional provisions” (para 847 of **Indra Sawhney-I**). The report of the Backward Classes Commission (B.C.Commission report) is microscopically analysed by almost all the counsel and presented before us commending its rejection on various grounds, namely, (i) the exercise by B.C.Commission lacked transparency and unfair; (ii) B.C.Commission did not evolve proper relevant criteria; (iii) B.C.Commission examined the question by applying the irrelevant criteria; (iv) the sample survey conducted by B.C.Commission is defective and (v) Inference drawn by Commission is not infallible. What is the standard of judicial scrutiny in such matters, whether strict scrutiny test is to be applied or intermediate scrutiny test is to be applied or deferential scrutiny test is to be applied? We have seen that primary review shall be strict scrutiny analysis and secondary review should be deferential review and scrutiny.

As already noticed, this Court invalidated executive order being G.O.Ms.No.33 dated 12.07.2004 whereunder Government provided 5 per cent reservations to Muslim Minorities. After the judgment of this Court in **Muralidhar Rao,** dated 21.09.2004, the Government of Andhra Pradesh constituted A.P. Commission for Backward Classes (B.C.Commission) with Justice Dalava Subrahmanyam, a retired Judge of this Court as its Chairman and four members, to examine the request for inclusion of any class of citizens as a backward class in the list, hear complaints of over inclusion or under inclusion of any backward class in such list and tender advise to the Government. The Commission was also enjoined with duty to examine and make recommendations of any other matter relating to Backward Classes that may be referred to the Commission by the Government. Thereafter, the Principal Secretary to Government in Backward Classes Welfare Department addressed a letter-dated 25.11.2004 to Member Secretary of B.C.Commission seeking the opinion of the B.C.Commission under Section 9(1) of Backward Classes Commission Act “whether to include Muslim Community within the purview of Backward Classes of Citizens”. That was the only reference made by the government to B.C.Commission, namely, whether to include Muslim community in the list of backward classes?

PLAN OF WORK BY COMMISSION

After receiving reference, the B.C.Commission (as disclosed in the counter affidavit filed by Member Secretary) called for representations/objections/ suggestions from the public with regard to the claim of Muslim community. A

notification was issued intimating dates of public hearing at different places. The Commission conducted public hearing at Hyderabad on 24.01.2005 and at various places at Anantapur, Guntur, Karimnagar, Kurnool, Mahaboobnagar, Nizamabad, Vijayawada and Visakhapatnam till 17.05.2005. It has conducted personal inspection of various localities, interacted with individuals and took videographs and photographs of the living conditions of Muslims. Then it took up the exercise of adopting criteria for determining the social backwardness of Muslims. As a first step, the Commission examined criteria adopted by previous Commissions, namely, Anantharaman Commission, Muralidhar Rao Commission and Mandal Commission and formulated its own criteria purportedly dealing with social, educational, economic and political aspects besides employment and occupational aspects. Thereafter, the Commission gathered data.

The primary data was collected with regard to the educational backwardness through the Department of Backward Classes Welfare, which employed hundred Assistant Backward Classes Welfare Officers (ABCWOs) who collected the enrolment particulars of students from 540 schools in 300 Mandals, the said sample survey formed the primary data. Insofar as the other data is concerned, the B.C.Commission gathered secondary data from National Sample Survey Organisation (NSSO) from its published report[98]. This data was in relation to distribution of persons by general education among Muslims in comparison with all other non-Muslim groups, school attendance rate per thousand persons, work force religion wise and persons employed and unemployed. Secondary data from A.P. Residential Educational Society, Department of Higher Education and other data published by other organizations for the purpose of study of admission patterns in Intermediate, Graduation and Professional Courses, was also collected. On analysis by the method it adopted, the Commission came to the conclusion that Muslim community is educationally and socially backward and they are not adequately represented in public employment. Accordingly, the Commission submitted its report titled as “Report on inclusion of Muslim Community in the list of Backward Classes in the State of Andhra Pradesh” to the Government on 14.06.2005[99]. Accepting the recommendations, the State promulgated the impugned Ordinance on 21.06.2005. This would show that the B.C.Commission commenced its work on 24.01.2005 (its first public hearing) at Hyderabad and completed the public hearing on 17.05.2005 and thereafter within a period of less than one month, submitted its report to the Government. The Government a week thereafter promulgated Ordinance declaring all the members of Muslim community as backward class.

The B.C.Commission report contains nine chapters. Chapter I and II deal with constitution and the reference to B.C.Commission. Chapter III deals with the background culminating the constitution of B.C.Commission and Government seeking its opinion on the question of inclusion of Muslim community within the purview of backward classes. Chapter IV is concerning the plan of work of the Commission and Chapter V, the constitutional provisions and the comments of B.C.Commission relating to backward classes. The general principles indicated by the High Court and the Supreme Court for determining social and educational backwardness are included in Chapter VI. In this chapter, B.C.Commission refers to **Balaji, Vasanth Kumar and Indra Sawhney-I** as well as **Muralidhar Rao**. In chapter VII, the B.C.Commission refers to criteria evolved by Anantharaman Commission, Mandal Commission, Muralidhar Rao Commission, while passingly making a reference to Kumara Pillai Commission (State of Kerala) and Nagan Gowda Committee (State of Karnataka). The B.C.Commission thereafter decided to adopt six-point criteria of determining the backwardness of any class of citizens. Chapter IX contains recommendations wherein the Commission concludes and recommends that Muslim in general are social and educational backward and they are fit to be included in the list of backward classes as a separate category under Group-E with five per cent reservations in education and public employment. Chapter VIII contains the analysis and findings of the Commission. In this Chapter, the Commission refers to the statistics it gathered from Backward Classes Welfare Department, Department of Higher Education and the Statistics found in the NSSO report. (We have considered about this in subsequent paras) The criticism of the report, as noticed above, is with reference to the method adopted and criteria evolved by B.C.Commission and the inference drawn by it on the question of social and educational backwardness. We consider these aspects separately.

FAIRNESS AND TRANSPARENCY IN THE PROCEEDINGS

The learned Senior counsel, Mr.K.Prakash Reddy and learned counsel Mr.L.Ravichander, appearing for two different parties vehemently contend that the B.C.Commission did not notify the criteria evolved by it to enable the objectors to effectively oppose the inclusion of Muslims in backward classes. They would also urge that in spite of making specific request to the Commission, the data collected by it and the criteria evolved by it, was not furnished and the B.C.Commission did not conduct open enquiry in a fair manner. The factual aspect of the matter is not disputed by the State. We, therefore, have to proceed on the premise that after

evolving the criteria for determining social backwardness, the Commission did not inform the objectors about the criteria to be followed in identifying Muslim community as backward and did not furnish the relevant data collected from primary sources and secondary sources for effective representation.

It requires no authority to mention that by its very nature, a Commission/Tribunal entrusted with the duty of identifying backwardness of citizens, conducting a fact finding enquiry. It is an enquiry required to be conducted in an objective manner based on objective criteria by adopting a scientific method for the purpose of effective enforcement of fundamental rights in Articles 15 and 16. The method or objective criteria adopted need not be flawless or letter perfect. It would be suffice if the criteria adopted by the B.C.Commission satisfies the broad aspects of objectivity and fairness. If any criteria is irrelevant or not objective, it would also fail to answer doctrine of fairness. It is now well settled that fair procedure in administration *sine qua non* to good democratic Governance. Any public authority entrusted with an enquiry concerning public affairs must ensure that such enquiry is informed of fairness to minimize complaints of capricious and arbitrary exercise of power. A reference may be made to **Neelima Misra v Harinder Kaur Paintal**[100] and **Jamaaat-e-Islami Hind v Union of India**[101]**.**

In **Dr.Guru Kula Mitra v State of A.P.**[102]**,** a learned Single Judge of this Court took the view that if the material collected by the Commission is used to defeat the claim of a person, the Commission will be under obligation to furnish the material collected by it. In the said case, the Commission obtained the report of sample survey from Indian Statistical Institute on the Social Backwardness of Castes/Classes. When the petitioner applied for a copy of the said report, the same was denied. In that context, this Court made the following observations.

> There cannot be any dispute with the contention of the Commission that the report is meant for its use but not for public use as long as the material collected in this sample survey is not used against or for considering the claims of the clusters or classes of people. While under Section 9 of the Commission is empowered to examine the requests for inclusion of any class of citizens as backward class in the lists and hear complaints of over-inclusion or under-inclusion of any backward class in such list and tender such advice to the Government as it deems appropriate. Under sub-section (2), the Commission is empowered to make recommendations on any other matter relating to the backward classes that may be referred to it by the Government from time to time. Under Section 10 of the Act the Commission shall while performing its functions under sub-section (1) of Section 9, shall have all the powers of a Civil Court trying a suit. **When the Commission is empowered with the powers of a Civil Court, it is needless to observe that its functions are quasi**

judicial in nature. Hence, the Commission is expected to give reasonable opportunity to the persons approaching the Commission for inclusion of their Groups in Backward Classes List and to place the material in support of their claim. Likewise, the material collected by the Commission for rejection of the claim should also be furnished to the claimant, so that he will be in a position to controvert the adverse circumstances that were pointed out by the Commission in rejecting its case. In other words the material collected by the Commission should be furnished to the claimants before it is made use of, for rejecting the claim for inclusion in the list. Then only the report or the proposal submitted by the Commission to the Government will be supported by the objectivity.

(emphasis supplied)

We are of the opinion that the provisions of Section 8(2), 9(1), 9(2) and 10 of B.C.Commission Act would also lead us to agree with the above observations made by this Court. That fair procedure should be adopted by a public authority is not denied. The State, however, defends the procedure of B.C.Commission contending that being not adversarial, in its enquiry B.C.Commission need not furnish the data to objectors before conducting a public hearing and that there was no necessity to inform the criteria as it is within the province of the B.C.Commission to choose its own criteria while conducting enquiry into the references before it. It is argued that such a move was not contemplated under the provisions of the Act and the same would not violate the principle of transparency.

Transparency in governance is exhortation of the day. In this context, a little elaboration is necessary. Doctrine of rule of law in legal and political philosophy means many things for many people. The universal theme, however, is that the constitutional governance by rule of law is preferable to governance by a few persons. Democracy presupposes peoples' rule by law or rule of law through people. The broad principle of rule of law contemplates that (i) all laws should be prospective, open and clear, (ii) laws should be stable, (iii) making of particular laws should be guided by stable and general rules, (iv) the principles of natural justice must be observed, and (v) there should be a system of implementation of laws guaranteeing the independence of judiciary duly conferring on it the power to review public law functions. Another important principle of rule of law is that the rulers must know the rules to the ruled. All persons must know what are the laws, rules and regulations by which they will be governed. This is more important in a democratic polity where an independent judiciary, lords over the exercise of legislative, judicial and administrative powers by other organs of the State, by reason of doctrine of judicial review. Transparency in public administration and constitutional governance is therefore a part of rule of law and indeed it is inseparable adjutant of 'rule of law'. This Court may make reference to **Jaisinghani** and **Merkur Island Shipping Corporation v. Laughton**[103] and the decision of the Supreme Court in **BALCO Employes' Union (Regd.) v. Union of India**[104]**.**

In **Jaisinghani**, a Constitution Bench of the Supreme Court delivered a unanimous Judgment. It was a case where seniority rule in Income Tax Officers Service Recruitment Rules was challenged. The posts in Grade II Class I are to be filled up from two sources, namely, 66 2/3 per cent by direct recruitment and 33 1/3 per cent by promotion from Grade III Class II. However, the promotees were given seniority with weightage over direct recruits of the same year and three previous years. The Government evolved a policy of determination of seniority between direct recruits and promotees keeping in view the said rule, which was assailed unsuccessfully before a Full Bench of Punjab & Haryana High Court. On appeal before the Supreme Court, it was contended that either the direct recruits or promotees appointed to Grade II Class I formed one class and therefore there cannot be any discrimination in the method and manner of reckoning seniority. Having regard to the rules, which permitted recruitment from two sources, the Supreme Court came to the conclusion that seniority rule is unreasonable offending Article 16 of Constitution of India. It was also observed that if a decision is taken without any principle or without any rule, it becomes unpredictable not in accordance with rule of law. This position was explained as under. (AIR para 14)

> In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with rule of law. (See Dicey – "Law of the Constitution" – Tenth Edn., Introduction cx). "Law has reached its finest moments," stated Douglas,J. in United States v Wunderlich, (1951) 342 US 98, "when it has freed man from the unlimited discretion of some ruler… Where discretion is absolute, man has always suffered". It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilkes, (1770) 4 Burr 2528 at p.2539 "means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful."

In **Merkur Island Shipping Corporation v. Laughton** (supra), Lord Donaldson MR. observed as under.

> At the beginning of this judgment I said that whilst I had reached the conclusion that the law was tolerably clear, the same could not be said of the way in which it was expressed. **The efficacy and maintenance of the rule of law, which is the foundation of any parliamentary democracy, has at least two pre-requisites. First, people must understand that it is in their interests, as well as in that of the community as a whole, that they should live their lives in accordance with the rules and all the rules. Second, they must**

> **know what those rules are.** Both are equally important and it is the second aspect of the rule of law which has caused me concern in the present case, the ITF having disavowed any intention to break the law.
>
> (emphasis supplied)

I n **BALCO Employees' Union (Regd.) v Union of India** (supra), the decision of the Government of India to disinvest in M/s.Bharat Aluminium Company Limited and the decision of the core group to disinvest Government shareholding in favour of M/s.Sterlite Industries for Rs.551.5 crores was impeached by BALCO Employees Union under Article 32 of the Constitution of India. It was, *inter alia,* contended that the decision making process lacked transparency and arbitrary. While explaining concept of transparency in public administration, the Supreme Court repelled the contention and observed as under.

> It was contended by the learned Advocate General that the whole process lacked transparency. We are not able to appreciate this contention. The disinvestment of BALCO commenced with the recommendation by the Disinvestment Committee in its second report suggesting that the Government may disinvest BALCO. It is by global advertisement that the Global Advisor and the strategic partner were chosen. At every stage, the matter was looked into by the IMG and ultimately by the Cabinet Committee on Disinvestment. **The system which was evolved was completely transparent. It was made known. Transparency does not mean the conducting of the government business while sitting on the crossroads in public. Transparency would require that the manner in which decision is taken is made known. Persons who are to decide are not arbitrarily selected or appointed.** Here we have the selection of the Global Advisor and the strategic partner through the process of issuance of global advertisement. It is the Global Advisor who selected the valuer who was already on the list of valuers maintained by the Government. Whatever material was received was examined by high power Committee known as the IMG and the ultimate decision was taken by the Cabinet Committee on Disinvestment.
>
> (emphasis supplied)

It may be taken as settled that public authorities as decision makers cannot act arbitrarily and that the manner in which decision is taken must be made known to all people, who depend on the decision of authority. Two things would emerge from the two precedents cited hereinabove on the question of transparency. The decision maker must ensure that the manner in which a decision would be made, that is to say, the rules and regulations, the precedents if any, and the law that is to be applied, are known to those people who will be benefited or burdened by the decision. Secondly, making known all concerned with the method and manner well in advance would ensure transparency, because persons would know "where they would stand".

Apart from the applicability of principles of fairness and principle of transparency, in its enquiry the B.C.Commission was also bound by the very provisions of B.C.Commission Act to notify the criteria and furnish the data collected by it to those opposing the inclusion of Muslim community in the list of backward classes. This is clear from a reading provisions of B.C.Commission Act. The B.C.Commission Act is a comprehensive Act providing for the

constitution of the Commission for Backward Classes in the State of Andhra Pradesh and to provide for matters connected therewith or incidental thereto. Chapter II deals with the constitution of B.C.Commission, the conditions of service of its Chairman and Members. Section 8 of the Act lays down that the Commission shall regulate its own procedure. Chapter III deals with functions and powers of the Commission. Section 10 confers powers of civil Court in summoning records, persons and examine them on oath. Under Section 9 of the Act, the Commission shall examine the request for inclusion of any class of citizens as backward class in the list[105]. It is also enjoined with the duty of hearing complaints of over inclusion or under inclusion of any backward class in the lists and tenders advise to the Government. While doing so, the Commission shall examine and make recommendations on any other matter relating to the backward classes. When the complaint is made to offer inclusion of any class, Law requires the Commission to examine it which only means some sort of enquiry is to be conducted with regard to a complaint. Such a complaint may be the very claim of class of citizens that it is backward class. While deciding the same, certainly it would be a relevant issue in the background of which criteria the claim of a class of citizens would be examined. Unless and until a person is aware prior to nature of enquiry by the Commission, any objection to the same would not be effective. Similarly even if the criteria is not notified prior to investigation based on which a class of citizens is included in the list of backward classes, there cannot be any effective participation in the enquiry by those who are supporting or opposing such inclusion or for that matter exclusion.

The Government in exercise of their powers under Section 17 of the Andhra Pradesh Commission for Backward Classes Act, 1993 (B.C.Commission Act) made A.P.Commission for Backward Classes Rules, 1993. Even these Rules make a provision in this regard.

Rules 3 and 4 are relevant. These read as under.

> **3. Receipt of Representations, etc:-** (1) The Chairperson or any member of the Commission or any officer of the Commission authorized in this regard by the Chairperson shall receive the representations or Memorandum presented either in person or sent by Post, by any individual or any group of individuals or any association or any organization.
>
> (2) The chairperson or any Member of the Commission shall receive any reference made by the Government on any matter under sub-section (2) of Section 9 of the Act.
>
> (3) Every representation received or reference made by the Government shall be registered in the office of the Commission.
>
> (4) The Commission may either suo-motu or on the request of the Government take up any issue relating to Backward Classes, conduct enquiries as it deems appropriate and advise the Government along with its observations on the subject.
>
> **4. Sittings and Hearings:-** (1) The Commission shall from time to time fix and notify the time, date and venue of sitting for hearing the version or argument from the recognized associations, organizations or individuals.
>
> (2) The Commission may hold meetings on its own at any place of its convenience or at the request of he recognized associations or individuals.
>
> (3) The Commission shall in advance notify about its sittings in all the Revenue Divisional Offices, Mandal Revenue Offices,

Collector's Office, Mandal Praja Parishad Offices, Zilla Praja Parishad Office and such other prominent places deemed necessary within the district whenever such meetings are proposed to be held.

(4) The Commission may visit places within the State of Andhra Pradesh to identify the problems, conditions and similar other aspects of Backward Classes or others and for making study of Socio-economic conditions of such communities.

(5) Wide publicity shall be given of all such visits and meetings of the Commission through press and other media especially in local language.

(6) In every sitting, there shall be a quorum of three members out of five.

(7) If the Chairperson is as sent any other senior members shall hold the meeting.

(8) There shall be an advance intimation by 'at least' 10 days before the date of meeting by the Commission.

(9) The meeting or sitting may be held either on any working day or on holiday as per the convenience of the Commission and of the public in general.

(10) In case of cancellation or adjournment of the scheduled meeting prescribed, it shall be intimated to the District Collector in time for arranging intimation to the general public and the parties invited.

A plain reading of Rules would show that whether the Commission is examining the request for inclusion of any class of citizens as a backward class in the lists and/or hearing complaints of over-inclusion or under-inclusion of any backward class in such a list or when the Commission takes up such an exercise on a specific reference made by the Government under Sections 9(2) and 11(1) of the Act, the Commission has to follow the procedure contemplated in Rules 3 and 4 of the Rules. The power of the Commission under Section 8 of the Act to regulate its own procedure is by no means denuded by the delegated legislation. The power under Section 8 of the Act remains intact but while exercising such power conferred under Section 8 of the Act to regulate its own procedure cannot totally give a go by rules of fairness which are explicit in Rules 3 and 4 of the Rules. The Commission after receiving representations or memoranda is required to fix and notify the time, date and venue of sitting for hearing the version or argument of the recognized associations in the matter of inclusion, over-inclusion and under-inclusion of a class of citizens in the list of backward classes. The Rules require wide publicity to be given with due intimation of at least ten days before the date of meeting of the Commission at different places. When such an elaborate pre-sitting exercise is required to invite large participation in the deliberations of the Commission, it would not be possible to accept the submission that the Commission is not bound to pre-notify its method, methodology and criteria evolved for inclusion of representees or for exclusion of a backward class. This

view also receives support from precedents as well.

A reference may be made to the following principle laid down by Chief Justice, Chandrachud, in **Vasanth Kumar** (AIR para 9).

> The policy of reservations in employment, education and legislative institutions should be reviewed every five years or so. That will at once afford an opportunity (i) to the State to rectify distortions arising out of particular facets of the reservation policy and (ii) to the people, both backward and non-backward, to ventilate their views in a public debate on the practical impact of the policy of reservations.

In **A.P.S.B.C.Welfare Association**, after analyzing the provisions of B.C.Commission Act, Subhashan Reddy,J (as his Lordship then was) observed as under (AIR para 41).

> In view of what is stated above, the irresistible conclusion is that the impugned G.O. cannot purport to be legislative in nature as the procedure for identification of the Backward Classes for conferment of the benefit of reservation flowing from Articles 15(4) and 16(4) of the Constitution is already prescribed by A.P.Act 20/93 and such an identification can only be made in accordance with the said mandatory procedure prescribed under the said act and not otherwise. B.C.Commission is yet to submit its report and before submission of report, **it will make a comprehensive enquiry be permitting the parties including the Government to adduce both oral and documentary evidence, opportunity of cross-examination, summoning of the witnesses and summoning of documents, if they are in custody of any other authority and it is only after such report is submitted, the State Government is empowered to take a decision in an objective manner and till then no new backward Class can be added.**
>
> (emphasis supplied)

In **Satyanarayana Reddy v State of Andhra Pradesh**[106], the Full Bench made the following observations (Jagannadh Rao,J as his Lordship then was):

> The second aspect of the matter is that there has not been any proper publication of the data of the Corporation mentioned in Explanation 2 to Secs.5(2) of the Act. It is a matter of grave concern that unpublished data or record of the Corporation has been made the statutory basis for reservation. This is, to say the least, highly objectionable and contrary to the spirit of fair elections in a democracy. Publication does not only mean in the Gazette but also includes all other manners of publication, viz., keeping the data open to inspection and scrutiny or making them available for sale. **Harla v the State of Rajasthan (AIR 1951 SC 647).** Further the public or for that matter the voters in the village or Mandal have had no opportunity to oppose the reservation of the particular Mandal concerned by showing that the population figures are wholly erroneous or contrary or inconsistent with Census data.

Affirmative action essentially involves classification of people as backward class of citizens and those who are not backward class of citizens. Even among

identified backward class of citizens, after fifty years of Independence, there is continuously brewing discontentment. The *raison d' etre* being the cake earmarked for backward classes is statedly being taken away by more powerful and more vociferous groups among them leaving others behind, though treating a class of citizens as backward class and more backward class is abhorred by the Supreme Court in **Vasanth Kumar** and **Indra Sawhney-I.** The reservation policy of State of Andhra Pradesh in implementing such policy by grouping backward classes into four groups received approval of Supreme Court in **Balaram**. The point that is to be noticed is that the more unfortunate in backward class group always grudge against less unfortunate class of backward classes and protest for the continuance of the latter group in the list of backward classes. There are also other categories that, for various reasons, were left out of the list of backward classes and desire to be included in such lists for reasons more than one. Even among included categories, there is continuous effort to move up from one lower group to higher group. This is the reality in Indian society especially in the State of Andhra Pradesh that cannot be ignored. The controversy is not between reservationists or non-reservationists.

As long as social disparities among groups of people are patent and one class of citizens in spite of best efforts cannot effectively avail "equality of opportunity" due to social and economic handicaps, the policy of affirmative action must receive the approval of the Constitutional Court. It does not however mean that the benefit of reservations in education and public employment should be siphoned off by those groups who lack constitutional qualification of being backward class of citizens in true sense. Any expert body or the Government is required to record a finding of backwardness in a class of citizens not by whims, fancies or caprice. The exercise should be scientific, based objective criteria. The exercise is essentially democratic where people themselves should decide by indirect participation in the process. Can the Government or expert commission do it without effective argument by those who oppose inclusion and those who support inclusion? Our answer should be in the negative. The more effective participation of the people in a democratic process, the more dynamic the democracy would be. Therefore, we cannot approve the submission made by the State in this regard.

In an enquiry of the nature undertaken by B.C.Commission, mere issue of notification inviting objections and conducting public hearings at different places would only satisfy the principles of fairness to some extent. In the absence of notifying the objectors of criteria prior to such hearings and furnish the material to such objectors prior to conducting public hearings, the enquiry conducted by the B.C.Commission cannot be called fair. The very purpose of issuing notification inviting objections and conducting public hearings, would be defeated if the criteria is not decided prior to undertaking, the collection of data and putting the objectors on notice. We accordingly hold against the State.

EDUCATIONAL BACKWARDNESS OF MUSLIMS

We may now take up the report of B.C.Commission to appreciate the rival contentions. Determination of social backwardness of a class of citizens needs an elaborate investigation and collection of data and examining the data in a rational and scientific way (see para 24 **Balaji**). Any collection of the data for the purpose of determining the social backwardness, it is always permissible to resort to sample survey "so long as the survey covers entire populace" (para 796 **Indra Sawhney–I**). If the sample size is not sufficient and is not representative capable

of furnishing the data regarding universe, any analysis cannot be rational and scientific. In a given case – like the present one; where the claim of a community/caste as a class for inclusion in the lists of backward classes has already been rejected twice, the quantity of sample must be larger than the normative standard. Insofar as the primary data collected by B.C.Commission through B.C.Welfare Department is concerned, it has been strenuously contended before us that the sample does not reflect the correct picture and alternatively even the figures collected would not lead to an inference that Muslim community is backward educationally. We find force in the submission.

It is admitted position that B.C.Commission collected primary data through B.C. Welfare Department from 540 schools in 300 Mandals out of 1127 Mandals. As per its findings, out of 51,353 total students enrolment in classes 1 to 5 (primary level) there were 4,857 students or 9.45% Muslim students. Similarly in classes 6th and 7th (upper primary level) out of total admissions 8.12% were Muslim students whereas it was 7.19% and 6.93% at secondary level and matriculation level. It has been brought to our notice (and this is not denied) that there are 92,768 schools and total enrolled in 1127 Mandals in the State[107]. If this is taken into consideration, the size of the sample of schools is 0.55%. As per the statistics published by Director of School Education, the total enrolment of students in elementary, primary, upper primary, secondary and high school education during 2004-2005 was 1,34,11,068. At all the levels of education, the B.C.Commission considered the students sample of 2,18,068. This cannot be said to cover the "entire population" as observed by the Supreme Court in **Indra Sawhney-I.** Further, the Commission erred in determining the percentage of Muslim students at each level with reference to the total non-Muslim students. This would not lead to any inference that Muslims are backward. If a benchmark is fixed with reference to different backward class communities or different forward class communities and the Muslim admissions are compared with such benchmark then only one can draw an appropriate inference as to whether there are less number of admissions among Muslims. As rightly pointed out, the percentage of Muslims at primary level (9.45%), upper primary level (8.12%), secondary level (7.19%) and matriculation (6.93%) favourably compares the total population of Muslims which is at 9.2% in the State of Andhra Pradesh. Insofar as Intermediate education, the education at graduation level is concerned, the enrolment of Muslim students percentage wise in comparison with total enrolments of non-Muslims, the gap is negligible.

It is submitted by the learned counsel for the petitioners that the sampling method adopted by the B.C.Commission is defective and that the size of the sample, which was analysed does not represent the universe. These are weighty reasons to accept this submission. Any sample design adopted in a social research must be unbiased. Social research scientists visualize two sample designs; non-probability sample design and probability sample design. In probability sample design, one can specify with specific accuracy, the probability that every unit representing different classes would be included in the sample. In non-probability sampling, it is mere chance and all the units in the larger population may not be represented. In non-probability sample design, the sample selected could either be convenience sample, purposive sample or judgment sample in which researchers select sampling units subjectively in an attempt to obtain a sample that appears to be representation of the population and/or quota sample in which researcher selects a sample which is as similar as possible to the sampling

population. When a social research is based on probability sample design, it is prone to be unbiased whether it is random sampling, systematic sampling, stratified sampling and closed sampling. In stratified sampling, the sampling population is divided into various groups and then sample is selected for each group, so that there is adequate representation of different sampling units.[108] Nextly, as it is often impossible, expensive and time consuming to study entire population, researchers take sample of the population so that precise inferences can be drawn from the study of the characteristics. The sufficiency of the sample size is determined based on the fact that subsequent explanations and predictions must be capable of being generalized on a scientific basis assuming that the sample represents entire unit of study.

When the B.C.Commission selected 540 schools in 300 Mandals out of 1127 Mandals and collected data through welfare officers, it had the particulars of 2,18,068 students at different levels up to secondary education. In simple terms, the B.C.Commission surveyed 1.8 schools per Mandal in 26 per cent of total 1127 Mandals and had the particulars of only 1.63 per cent of students. The sample design and the sample size indicate disproportionate representation and does not reflect the actual distribution of population. If this sample is taken as representing entire unit of study, it would assume that there is even distribution of Muslim population in 300 Mandals and there are nearly similar proportionate of admissions in 540 schools. In the absence of any communitywise figures before the B.C.Commission, it would not be possible to assume like that. Further, the variation in terms of rural – urban type of schools including Urdu medium schools and private unaided schools under CBSE and ICSE has not be considered. That is to say, the stratified sampling figures and estimates were not taken at all. In our considered opinion, any comprehensive and scientific social research must identify proper indicators (benchmarks) and to conduct specified sample survey and then analyse the data with reference to indicators of backwardness duly keeping in view non-variable factors like gender, rural/urban and age.

In a statistical method as mentioned above, one has to first fix controlling benchmark, analyse the data regarding class under study and then compare the result with the benchmark. If the data of such group is almost near or not far below the controlling group, having regard to the fact that a minority group which is less than 10% is being compared with non-minority group of remaining more than 90% consisting of various groups and sub-groups and categories, (stratified general population) a conclusion can be drawn that target group is not backward in comparison with other groups. This exercise was not done by the Commission. What was done was taking total number of Muslim enrolment at various levels of education and compare them with the total non-Muslim students which in our opinion is not a correct and rational method.

The same applies to the admissions to professional courses like Engineering, B.Ed., and medical courses. While dealing with this aspect, there was a considerable debate whether or not to include the students admitted to professional courses in minority professional educational institutions. The B.C.Commission did not think it necessary to include those figures presumably for the reason that in those institutions, the Muslim minority students are preferred to other groups and they cannot be considered while dealing with the admissions in non-minority educational institutions. Here again, we are not able to accept the method adopted by the Commission. Whether a citizen is educated in minority institution or non-minority institution, it shall not make any difference insofar as

his/her eligibility, when he/she competes in other fields. It has been demonstrated before us that even in admissions in professional colleges, if the total admissions in minority institutions are taken into consideration, the findings of the B.C.Commission do not reflect the correct position. We are aware that this Court is not sitting in Appeal over the report of the B.C.Commission. As this matter is subjected to intermediate scrutiny, we need to see whether there was relevant material before Commission, whether proper data inputs are analysed and whether findings are not perverse.

After referring to the primary data as well as the secondary data, the B.C.Commission evaluated percentage gap in Muslim participation. For the said purpose, the B.C.Commission adopted the formula b-a/bx100 where 'a' is Muslim percentage admissions at each level of education, 'b' is percentage of Muslim population in Andhra Pradesh. As already observed by us, Muslim population is 9.2%. Being minority, they will always be far far less than the majority population. If the percentage of non-Muslim participation in education is calculated, the same is without any anamolies. The method adopted, therefore, cannot be scientific to arrive at the conclusion that they are educationally backward. The B.C.Commission after referring to the admission pattern and taking percentage gap came to the following conclusion. (page 68 of Report)

> From the above whole scenario it is clear that percentage of Muslim participation at every level of education is much less than their percentage of population and in professional courses is abysmally low. The pattern is very ominous i.e. at the level of education increases, Muslim participation is dwindling. Not only this, following table also reveals that in all age groups attendance rate of Muslim students is poorer than the general population; one explanation which has been given is that poverty drives them to continue doing odd jobs along with perusing studies, resulting in poor attendance in classes and secondly with advancement of age, more and more Muslim boys are compelled to discontinue education and join their family in eking out livelihood in view of their poverty.

It is nobody's case that if the percentage gap in participation of education is NIL, such class of citizens can be treated as socially backward. Conversely, if the percentage gap of a given population is less than 50% or low, the same does not lead to inference that such group is educationally backward. It should not be forgotten that in any State achieving 100% literacy cannot be accomplished overnight.

The learned counsel for the petitioners in W.P.No.13832 of 2005 has placed before comparative statement with regard to State average and Muslim average in the matter of education at all levels, in the matter of Government employment and also with regard to occupation/employment. It is pointed out to us that the statistical tables below are prepared in the matter of education based on the educational statistics 2004-05[109] and comparing those figures with the figures relied on by the BCC. We are aware that ordinarily, Court of judicial review is precluded from going into questions of fact and also examining the merits of a decision. But if the decision is challenged as being arbitrary, irrational and on the

ground of perversity, it would be well neigh impossible for reviewing Court to appreciate the grounds without basic review of the factual background. In such a case, review of facts in the light of evidence produced before the Court is permissible. In a recent judgment in **State of U.P., v Johri Mal** (supra), the Supreme Court observed as under, which supports our view. (SCC para 30).

> It is well settled that while exercising the power of judicial review, the Court is more concerned with the decision-making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the Court is not competent to exercise its power when there are serious disputed questions of facts; when the decision of the Tribunal or the decision of the fact-finding body or the Arbitrator is given finality by the statute which governs a given situation or which by nature of the activity, the decision makers opinion on facts is final. **But while examining and scrutinizing the decision making process, it becomes inevitable to also appreciate the facts of a given case as otherwise, the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the Court of judicial review can re-appreciate the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be well neigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touchstone of the tests laid down by the Court with special reference to a given case. This position is well settled in Indian Administrative Law. Therefore, to a limited extent of scrutinizing the decision making process, it is always open to the Court to review the evaluation of facts by the decision-maker.**
>
> (emphasis supplied)

Further impugned Ordinance assumes existence of facts based on report of B.C.Commission. In such an event, correctness of such factual assumption may be an issue. Legislative declaration of facts is not beyond the purview of judicial review. This is well settled. The Supreme Court in **Indra Sawhney-II** after referring to **Kesavananda Bharati v. State of Kerala**[110] observed as under:

> It is now fairly well settled that legislative declarations of facts are not beyond judicial scrutiny in the constitutional context of Articles 14 and 16. In *Kesavananda Bharati v. State of Kerala* the question arose – in the context of legislative declarations made for purposes of Article 31-C – whether the court was precluded from lifting the veil, examining the facts and holding such legislative declarations as invalid. The said issue was dealt with in various judgments in that case, e.g., judgments of Ray,J. (as he then was), Palekar, Khanna, Mathew, Dwivedi, JJ., and Beg,J. and Chandrachud, J. (as they then were) (see summary at pp.304-L to O in SCC). The learned Judges held that the courts could lift the veil and examine the position in spite of a legislative declaration. Ray,J. (as he then was) observed: (SCC Headnote)

"The court can *tear the veil* to decide the real nature of the statute if the facts and circumstances warrant such a course.

* * *

A conclusive declaration would not be permissible so as to defeat a fundamental right".

Palekar, J. said that if the legislation was merely a *pretence* and the object was discrimination, the validity of the statute could be examined by the court notwithstanding the declaration made by the legislature and the learned Judge referred to *Charles Russell* v . *R.* [(1882) 7 AC 829 : 51 LJPC 77 : 46 LT 889] and to *Attorney General* v. *Queen Insurance Co.* [(1878) 3 AC 1090] Khanna, J. held that the declaration could not preclude judicial scrutiny. Mathew, J. held that declarations were amenable to judicial scrutiny. If the law was passed only "ostensibly" but was in truth and substance, one for accomplishing an unauthorized object, the court, it was held, would be entitled to tear the veil. Beg,J. (as he then was) held that the declaration by the legislature would not preclude a judicial examination. Dwivedi, J. said that the courts retain the power in spite of Article 31-C to determine the correctness of the declaration. Chandrachud, J. (as he then was) held that the declaration could not be utilized as a *cloak* to evade the law and the declaration would not preclude the jurisdiction of the courts to examine the facts.

37. This being the legal position, this Court could certainly examine whether the so-called "known facts" referred to in Section 3 were indeed non-existent.

In view of the above legal position, we shall have to look into the rationale behind the conclusions of BCC with reference to the statistical data which purportedly collected from primary and secondary sources. We have prepared Tables as below which will show the position of Muslims and non-Muslims with reference to various parameters.

EDUCATIONAL INDICES

TABLE I.1 SCHOOL EDUCATION
(Number of Admissions)

Total population of A.P.: 76210007
Muslim population in A.P.:6986856

Particulars	Primary Level – Classes I to V	Upper Primary Level – Classes VI & VII	Secondary Level – Classes VIII & IX	Matriculation Level – Class X
Total students	51353	43521	97392	26072
Muslim students	4857	3514	7005	1808
State average	0.06738	0.05675	0.127	0.0342
Muslim average	0.0695	0.0502	0.1002	0.0258

Size of the sample (Schools) – 0.58% of 92,768 schools
Size of the sample (Students) – 1.62% of the total number of students
Size of the sample in Mandal/Zilla Parishad level – 2.86%

Average is in percentage.

Table I.1 would show enrolment of students at various levels. For the sake of convenience, education at primary level (classes I to V), upper primary level (classes VI and VII), secondary level (classes VIII and IX) and matriculation level (class X) are included in Table I.1. In fact, the B.C.Commission also considered in the same manner. In so far as admission of students at primary, upper primary and secondary level is concerned, the Muslim average cannot be said to be below 50 per cent or far below the State average. If the State average is calculated as is done by the B.C.Commission only with reference to the actual number of non-Muslim students, the same would certainly lead to inference that Muslim students percentage is far below than the students belonging to non-Muslim category. That is not a scientific method. As we presently show that while examining whether the particular class of citizens is educationally backward, the proper method is to take the total number of students belonging to such class, and work out the percentage with reference to the total population of that class. The next step is to take the percentage of students belonging to other classes (stratified groups) with reference to their total population to arrive at the percentage of students admitted at various levels of education. A comparison of the two would then may lead to some conclusion; whether or not a particular class of citizens is below 50 per cent or far below the State average. This was not done by B.C.Commission. On the figures relied on by the B.C.Commission as well as the State average figures we have arrived at, we are convinced that the admission of Muslim students at different levels of school education cannot be said to be abysmally low or far below the State average.

TABLE I.2 INTERMEDIATE AND GRADUATE EDUCATION
(Number of Admissions)

Particulars	INTERMEDIATE			GRADUATION		
				Government Colleges	Private Aided Colleges	Private Unaided Colleges
Year	2001-02	2002-03	2003-04	--	--	--
Total students	835300	1084046	1197071	150277	225377	308487
Muslim students	46286	57576	90316	8868	15999	17111
State average	1.09	1.42	1.57	0.197	0.295	0.407
Muslim average	0.66	0.82	1.29	0.126	0.228	0.24

Explanation: Graduation figures for 2003-2004

In Table I.2, we have shown the State average and Muslim average in relation to Intermediate and Degree courses. Here again in Intermediate education, for the years 2001-2002 and 2002-2003, the admission of Muslim students is above 50 per cent of State average whereas for the years 2003-04, the Muslim average is more than 75 per cent when compared with the State average. In Government Degree Colleges, except a difference of 0.071 in the averages, the admission of

Muslim students is not below 50 per cent of the State average. The same is the case in private aided colleges as well as private unaided colleges though in private unaided colleges, Muslim average is just above 50 per cent of the State average. Here again, as mentioned in relation to School education, we do not find much disparity in the percentage of admissions of Muslim students and non-Muslim students.

TABLE I.3 PROFESSIONAL COURSES – ENGINEERING
(Number of Admissions)

		EAMCET			ECET		
	Year	2002-2003	2003-2004	2004-2005	2002-2003	2003-2004	2004-2005
	Total students	46638	44627	46532	-	4405	3869
VATE EERING	Muslim students	650	848	1058	-	118	142
	State average	0.061	0.08	0.061	-	0.0057	0.005
	Muslim Average	0.009	0.012	0.015	-	0.00168	0.002
	Total students	2305	2016	1970	-	118	102
ERSITY EERING	Muslim students	35	43	40	-	3	4
	State average	0.003	0.0026	0.0025	-	0.000154	0.00013
	Muslim Average	0.0005	0.000615	0.00057	-	0.000043	0.000057

EAMCET: Engineering, Agricultural and Medical Common Entrance Test
ECET: Engineering Common Entrance Test

TABLE I.4 PROFESSIONAL COURSES – MEDICAL
(Number of Admissions)

M.B., B.S.,				B.D.S.,			
Total students	Muslim students	State average	Muslim average	Total students	Muslim students	State average	Muslim average
1909	59	0.0025	0.00084	122	6	0.00016	0.000086
1977	58	0.00259	0.00083	500	20	0.00066	0.00028
2399	71	0.00315	0.001	851	46	0.0011	0.00066
2302	109	0.00302	0.00156	721	29	0.00095	0.000415
2869	155	0.00376	0.002	926	54	0.0012	0.00077

In Tables I.3 and I.4, the details of enrolment in Private Engineering

Colleges, University Engineering Colleges and enrolment in Medical Colleges is tabulated. In the case of Engineering, the B.C.Commission considered the figures for three academic years based on Engineering, Agricultural and Medical Common Entrance Test (EAMCET) as well as Engineering Common Entrance Test (E-CET) for two years. Medical admissions for years from 2000-2001 to 2004-2005 were considered. Table I.3 would show that for the academic years 2002-2003 to 2004-2005, admission of Muslim students in Private Engineering Colleges as well as University Engineering is below 50 per cent of State average. The reason is obvious; the Commission did not take into consideration the enrolment of Muslim students in considerable number of Minority Professional Colleges. The same is the case with regard to the Medical admissions as well as enrolments in B.D.S. In addition to this, when considering educational backwardness, to our mind the enrolment in Professional Colleges is not relevant criteria. By and large pursuit of professional education is not considered as part of general education. Large number of students may try their best to get into professional courses but having regard to the fact that there are very few seats in professional courses and large number of competing students, only a few students will get into the courses. This applies even to those students belonging to SC/ST/backward classes. Not all students belonging to such categories get seats but only those who come up in the merit among them are given the seats reserved for these classes. The criteria of enrolment in professional courses is therefore not relevant for examining educational backwardness especially when Minorities are given a fundamental right to establish educational institutions of their choice and ordinarily the State cannot deny such right.

At this stage, before further dealing with this aspect, we may refer to paragraphs 26 and 27 in **Balaji,** wherein Gajendragadkar,J observed that, "only communities which are well below the State average can properly be regarded as educationally backward classes of citizens". These are extracted below.

> On the figures supplied to the Committee which admittedly are approximate and not fully accurate, the Committee came to the conclusion that the State average of student population in the last three High School classes of all High Schools in the State was 6.9 per thousand. The Committee decided that all castes whose average was less than the State average of 6.9 per thousand should be regarded as backward communities, and it further held that if the average of any community was less than 50% of the State average, it should be regarded as constituting the more backward classes. **It may be conceded that in determining the educational backwardness of a class of citizens, the literacy test supplied by the Census Reports may not be adequate; but it is doubtful if the test of the average of student population in the last three High School classes is appropriate in determining the educational backwardness. Having regard to the fact that the test is intended to determine who are educationally backward classes, it may not be necessary or proper to put the test as high as has been done by the Committee. But even assuming that the test applied is rational and permissible under Article 15(4), the question still remains as to whether it would be legitimate to treat castes or communities which are just below the State average as educationally backward classes.** If the State average is 6.9 per thousand, a community which satisfied the said test or is just below the said test cannot be regarded

as backward. **It is only communities which are well below the State average that can properly be regarded as educationally backward classes of citizens. Classes of citizens whose average of student population works below 50% of the State average are obviously educationally backward classes of citizens.** Therefore, in our opinion, the State was not justified in including in the list of Backward Classes, castes or communities whose average of student population per thousand was slightly above, or very near, or just below the State average.

(emphasis supplied)

Balaji Bench also considered the validity of inclusion of entire Muslim community in the list of backward classes. (AIR para 28)

In regard to the Muslims, the majority view in the Committee was that the Muslim community as a whole should be treated as socially backward. **This conclusion is stated merely as a conclusion and no data or reasons are cited in support of it. The average of student population in respect of this community works at 5 per thousand and that, in our opinion, is not so below the State average that the community could be treated as educationally backward in the State of Mysore.** Therefore, we are not satisfied that the State was justified in making the view that communities or castes whose average of student population was the same as, or just below, the State average, should be treated as educationally backward classes of citizens. **If the test has to be applied by a reference to the State average of student population, the legitimate view to take would be that the classes of citizens whose average is well or substantially below the State average can be treated as educationally backward.** On this point again, we do not propose to lay down any hard and fast rule; it is for the State to consider the matter and decide it in a manner which is consistent with the requirements of Article 15(4).

(emphasis supplied)

A reading of above two paragraphs would indicate that unless and until the educational participation of a particular community is substantially below fifty per cent of State average, the same cannot be treated as backward class and that in so far as Muslim community is concerned, if the average of student population of Muslim community works out 'five per thousand', the same is not below State average and cannot be treated as educationally backward. Therefore, in dealing with the percentage or number of school admissions or college admission, any Commission at a first step has to first fix normative/standard and benchmark with reference to the general population, then consider the population of a backward class community on principle of average. This was not done in this case and the percentage gap worked out by the Commission at page 67 of its Report, even according to some of the counsel for interveners is open to criticism. As observed by Supreme Court in **Indra Sawhney-I,** "backwardness, being a relative term, must in the context be judged by general level of advancement of the entire population of the State..". This was not done by B.C.Commission.

SOCIAL BACKWARDNESS OF MUSLIMS

In the course of its analysis, B.C.Commission has drawn copiously from NSSO. These figures are on all India basis. They do not furnish any relevant data for the purpose of determining the social backwardness of Muslim community in Andhra Pradesh. It may be remembered that social backwardness in a given State is not the social backwardness on All India basis. While piloting the provision in the Constituent Assembly, Dr.B.R.Ambedkar clarified that, "a backward community is a community which is backward in the opinion of the Government". That is to say, a class may be identified as a backward class in one State and it may not be so in another State. Therefore, what was relevant for an objective enquiry is the large sample figures in the State of Andhra Pradesh and the National Sample Survey conducted by NSSO, in our opinion, might be helpful in starting enquiry but not reaching a conclusion.

The learned Advocate General submits that B.C.Commission has not relied on the statistics collected by NSSO. According to him, they were only referred by B.C.Commission while coming to the conclusion that Muslim community is backward and that B.C.Commission relied on only the date relevant for the State of Andhra Pradesh. There cannot be any denial that repeatedly the apex Court has laid down that any enquiry by the Government or a Commission for identifying backward classes must be based on scientific method and objective criteria. When an authority is required to take a decision based on objective criteria and while doing so such authority also relied on some material which is irrelevant and which is not germane to the enquiry, it would not be possible to know which of the criteria influenced the decision maker. In such an event, the Court has to strike down the decision. This position is well settled. We may refer to some precedents on this.

In **Dhirajlal v. I.T. Commissioner, Bombay**[111], a Constitution Bench of the Hon'ble Supreme Court held that a clear issue of law arises in a situation where the Court of fact arrives at the decision by considering material which is partly relevant and partly irrelevant or bases its decision partly on conjectures, surmises and suspicions and partly on evidence or considers material which is irrelevant to the enquiry. The ratio was laid down as under:

> **It is well established that when a court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises."**
>
> (emphasis supplied)

In **State of Maharashtra v. B.K.Takkamore**[112] a three Judge Bench of the apex Court again considered the question. After referring to the earlier judgments in Dhirajlal's case (supra) and **Dwaraka Dass Bhatia v. State of Jammu and Kashmir**[113], **State of Orissa v. Bidyabhushan Mahapatra**[114], the Court summed up the principle as under:

> The principle underlying these decisions appears to be

this. **An administrative or quasi-judicial order based on several grounds, all taken together, cannot be sustained if it be found that some of the grounds are non-existent or irrelevant, and there is nothing to show that the authority would have passed the order on the basis of the other relevant and existing grounds.**

(emphasis supplied)

In **Zora Singh v. J.M.Tandon**[115], the earlier view that in all situations, the orders passed on relevant and irrelevant and extraneous considerations, as a general rule would fall foul, was not accepted when the Supreme Court laid down as under:

> The principle that if some of the reasons relied on by a Tribunal for its conclusion turn out to be extraneous or otherwise unsustainable, its decision would be vitiated, applies to cases in which the conclusion is arrived at not on assessment of objective satisfaction. The reason is that whereas in cases where the decision is based on subjective satisfaction if some of the reasons turn out to be irrelevant or invalid, it would be impossible for a superior court to find out which of the reasons, relevant or irrelevant, valid or invalid, had brought about such satisfaction. But in a case where the conclusion is based on objective facts and evidence, such a difficulty would not arise. If it is found that there was legal evidence before the Tribunal, even if some of it was irrelevant, a superior court would not interfere if the finding can be sustained on the rest of the evidence. The reason is that in a writ petition for certiorari, the superior court does not sit in appeal, but exercises only supervisory jurisdiction, and, therefore, does not enter into the question of sufficiency of evidence.

From the above decisions, it would emerge that if an authority also refers to material which is not relevant for an objective consideration of the issue, in the absence of any evidence to the effect that even without such irrelevant material, the authority would have arrived at the same conclusion, the Court would not be inclined to approve such decision. A perusal of the report of B.C.Commission would make it clear that while determining the educational backwardness and coming to the conclusion that Muslim community is socially backward, the B.C.Commission also placed emphatic reliance on the conclusions of NSSO report. Indeed as observed supra, the employment/unemployment status of Muslim community was the lone criteria adopted by the B.C.Commission in determining the social backwardness and for doing so it relied mainly on NSSO.

All the learned counsel contend that B.C.Commission has not considered any material regarding social backwardness, that there was no material before the Commission to determine the social backwardness of Muslim community and that the B.C.Commission relied on irrelevant and extraneous material for arriving at a

conclusion. Here again, we are compelled to countenance the submission of the learned counsel. How to determine social backwardness? The answer is not simple. This question cropped up before the apex Court on umpteen occasions and decisions are galore. The Supreme Court while observing that there cannot be definite non-variable criteria for determining social backwardness laid down that the criteria has to be evolved by the Government or a Commission appointed by it and that such criteria must be scientific and rational. Again the Supreme Court also pointed out that when Hindu caste groups are considered, the criteria would be different and when non-Hindu groups or other religious groups are considered, the criteria would have to be different for the purpose of identifying social backwardness. The following observations – at the cost of repetition; in **Indra Sawhney-I** (para 782) lay down such rule.

> … There is no law or other statutory instrument prescribing the methodology. The ultimate idea is to survey the entire populace. If so, one can well begin with castes, which represent explicit identifiable social classes/groupings, more particularly when Article 16(4) of the Constitution of India seeks to ameliorate social backwardness… This does not mean that one can wind up the process of identification with castes. Besides castes (whether found among Hindus or others), there may be other communities, groups, classes and denominations, which may qualify as backward class of citizens… The concept of 'caste' in this behalf is not confined to castes among Hindus. **It extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice.** Having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes.
>
> (emphasis supplied)

Again in para 783, the majority in **Indra Sawhney-I** observed as under.

> … Indeed, there is no such thing as a standard or model procedure/approach. It is for the authority (appointed to identify) to adopt such approach and procedure as it thinks appropriate, and so long as the approach adopted by it is fair and adequate, the Court has no say in the matter. **The only object of the discussion in the preceding para is to emphasise that if a Commission/Authority begins its process of identification with castes (among Hindus) and occupational groupings among others, it cannot by that reason alone be said to be constitutionally or legally bad.**
>
> (emphasis supplied)

The above principles are very relevant while considering the submission of the learned counsel for the petitioners that the B.C.Commission did not evolve appropriate criteria for identifying social backwardness of Muslim community and that B.C.Commission took into consideration irrelevant and extraneous data for the purpose of determining the social backwardness. Chapter VIII of the B.C.Commission report called "Report on inclusion of Muslim Community in the list

of Backward Classes in the State of Andhra Pradesh" is in two parts. The first part deals with educational backwardness. We have already dealt with this aspect of the matter. The second part deals with social backwardness of Muslim community. The B.C.Commission in Chapter VII, as already noticed, referred to Anantharaman, Muralidhar Rao and Mandal Commission reports and decided to adopt the following criteria for determining backwardness for any class of citizens.

1. The general poverty of the class as a whole;
2. Engagement in one of the following occupation:-
    a) Cultivator
    b) Artisan
    c) Petty businessmen
    d) Class IV in government services and corresponding class or service in private employment
    e) Any other occupation involving manual labour.
3. Living in slum and unhygienic habitations
4. Quantum of political representation in elected bodies.
5. Education; and
6. Employment

The Commission analysed the primary and secondary data while applying criteria No.5 (education) to consider the educational backwardness of Muslim community. Except criteria No.5, all other criteria were adopted for determining the social backwardness. Even according to B.C.Commission "it is not possible to conduct census by the Commission on any reasonable sample scale in the time frame and it is not practicable for the Commission to undertake census in the available time frame in view of constraints of resources and administrative machinery". (page 52 of Report) Thus, B.C.Commission did not collect any primary data and the public hearings which held at different places cannot be considered as an exercise for collection of primary data. It entirely relied on first report on Religion of Census of India, 2001, NSSO report, the information furnished by Department of Rural Development, Government of Andhra Pradesh and its personal visits to Muslim inhabitant areas. After going through this material, it came to the conclusion that Muslim community as a whole class, is socially and educationally backward in comparison with the society at large.

For determining social backwardness, B.C.Commission first considered religionwise data of occupations. Table II.1 below would show this data with State average and Muslim average.

TABLE II. 1. RELIGIONWISE OCCUPATION – WORKERS BY CATEGORY OF WORK.

Particulars	Total Population	Muslim Population	State Average	Muslim Average
Rural-Cultivator	757337	166999	0.99	2.39

Urban-Cultivator	102197	8760	0.13	0.125
Rural-Agrl. Labourers	1384671	486511	1.81	6.96
Urban-Agrl. Labourers	447481	29171	0.587	0.417
Rural-Household Industry Workers	1237065	79643	1.62	1.14
Urban-Household Industry Workers	405040	65190	0.53	.093
Rural-other workers	5793815	502744	7.6	7.19
Urban-other workers	5766253	1021965	7.56	14.62
Rural-Employed out of 1000	542	427	--	--
Urban-Employed out of 1000	349	294	--	--
Total Employed out of 1000	891	721	89.1	72.1

Table II.1 would show number of workers/employees by category of work and religion. Out of 1,000 employed persons both rural and urban, 89.1 per thousand is the State average whereas Muslim average is 72.1 for Muslim community. The number of urban workers, rural workers, rural/urban household workers does not show any alarming difference. In so far as cultivators in the rural areas is concerned, the percentage of Muslims; as per the figures taken by the Commission – appears to be more. This may not lead to an inference that all Muslims are rural cultivators. In any view of the matter by reason of being cultivator in rural area, a person cannot be identified as backward as held by the Supreme Court in **Janaki Prasad** (AIR para 32).

The Commission relied on the First report on Religion (Census of India) for the purpose of workers and non-workers by religion ratio between Muslims and non-Muslims, workers by category of work on the basis of religion and residence, and came to the conclusion that number of non-workers among Muslims is 66.20% against National average of 54.21%. Then it considered the data as available in NSSO report regarding Worker Population Ratio, proportion of persons employed per thousand, the unemployment ratio among Muslims and non-Muslims, monthly per capita expenditure for all people of Muslims, proportion of cultivators up to 1.00 hectares by major religions and the distribution of land among households. The Commission also noticed that minorities in rural employment programme known as Swarnajayanti Gram Swarozgar Yojana are below the required level. Then the

Commission observed as under.

> From the above statistics the scenario which emerges is that as compared to general population, unemployment rate among Muslims is much higher, their share in salaried employment is much lower, they are mostly working as self employed in petty trade as rickshaw pullers, push cart traders and as labourers, most of their population falls in lower monthly expenditure bracket, their ownership of land is marginal, their access to education and higher education is wanting, malnutrition among them is rampant which coupled with lower affordability of medical facilities is resulting in their lesser longevity of life and above all even the benefits of governmental welfare programmes are not reaching them even to the share of their percentage in population… (pp 77-78)
>
> … The Commission also visited several districts and specifically visited Muslim inhabited areas. The visit and the interaction with the Muslim families revealed that most of the Muslims live below poverty line and eke out their livelihood by doing manual labour, unskilled labour, masons, rickshaw pullers, drivers, hawkers and cycle-repairs and vulcanizing etc. A considerable section of the Muslims are found involved in traditional begging. Most of the women and children are engaged in beedi-rolling and their income is very meager. Most of them live in semi-pucca houses and temporary shelters and mostly in huts and tiled roofs. They do not have sufficient water supply and toilet and bathroom facilities in their houses and their living is mostly un-hygienic. During the visit of the commission, it was observed that most of the Muslim children both boys and girls are engaged in Beedi rolling in view of meager income of the family and they do not attend the schools. The parents cannot afford to send their children to the schools since the children also have to earn for the family. Their level of education is far below and they do not get any chance to go out for higher studies due to poverty. The commission also took videographs and photographs on the living conditions of the Muslims. A job essentially involving physical labour is considered as manual work. Jobs such as cooks, waiter, maid servants, sweepers, cleaner, barbers, watchmen, gatekeepers etc are concerned as manual work. During the visit of the commission, it revealed that most of the Muslims are engaged and depend on manual work. (pp 80-81)

In a separate part of this judgment, we have already considered the possible appropriate criteria that may be adopted or applied while determining the question whether a class of citizens is backward or not. We are aware that the Court of judicial scrutiny is not entitled to lay down any definite criteria and compel the State to apply such criteria. However, having regard to the long history of judicial review in such matters, certain principles as we have noticed supra, have come to be accepted by the State as being valid criteria for determining social backwardness, which would enable a rational and scientific approach in determining the social backwardness of a class/group of citizens to be eligible for the constitutional concessions. The criteria evolved by any Commission, it is now well settled, should embrace sociological, social and economic considerations (**Balaji** para 24). Mere economic criteria and/or political criteria or demographic criteria alone would not be relevant for such an exercise though these criteria may as well support a conclusion on social backwardness if entire caste or group is socially backward by reason of such caste or by reason of occupation of members of the class and such status impedes upward mobility socially and economically.

It is certainly a factor to be considered. In such a case social backwardness may afflict a citizen when there are more social, economic and cultural factors explicitly or impliedly prohibiting or slowing down the individual effort to avail the vast opportunities thrown open by growing economy. As observed by Supreme Court in **Indra Sawhney-I** (SCC paras 787-788), "social backwardness leads to educational backwardness and both of them together lead to poverty, which in turn breeds and perpetuates the social and educational backwardness". We may add that mere educational backwardness and political backwardness of a class/group of citizens for different sociological and cultural reasons, by itself would not lead to an inference that the class/group is backward. Such an approach would not only ignore the law laid down by the Supreme Court but also amounts to putting cart before the horse. Be that as it is, as we already noticed, the "absence of social structure, social hierarchy, absence of technology to control the environment, traditional apathy for education on account of such social status, organization in the society to create inducements to uplift people and improve economy, and absence of paraphernalia like enterprise, economic resources for creating social welfare are all indicative of social backwardness" (**Pradip Tandon** para 18).

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DEFECTIVE AND UNRELATED CRITERIA

The B.C.Commission has evolved the criteria like general poverty, occupation/avocation of position in Government service, engagement in manual labour, the area of residence and political representation for determining social backwardness. In our considered opinion, the criteria evolved by the B.C.Commission was not relevant for determining social backwardness of Muslim community as a whole. If the B.C.Commission had considered different groups of Muslim community, based on either their occupation or being closely knit insular groups (we may call them caste groups or Jamat or Biladari)[116] and had taken up each such group for applying the criteria first deciding that by reason of their occupation, they are socially backward and by reason of their avocation as manual labour, by their habitation in slums etc., the conclusion and the exercise thereto would have been different. Consideration of entire Muslim community and applying the criteria – if they are applicable; has resulted in misdirection in law. Though the Commission evolved the above criteria for the purpose of determining social backwardness, one finds that the Commission did not compare the figures of Muslims available with regard to State averages and the status of other forward/backward classes in the State. Only such comparative analysis can lead to a rational and scientific approach and not otherwise. Supreme Court in various judgments held only occupation, the economic status, the residential status of a class of persons cannot be validly lead to a conclusion that such class is backward.

Whether poverty criteria 1, 2, 3 and 4 evolved by B.C.Commission dealing with poverty itself can be a conclusive proof of social backwardness? The answer is in the negative. There are three authorities of the Supreme Court on this. In **Pradip Tandon**, the challenge was to the reservations made by State of Uttar Pradesh in favour of candidates from rural areas, hill areas and Uttarkhand areas. The three-Judge Bench of the Supreme Court upheld the reservations in favour of candidates from hill and Uttarkhand areas but invalidated the reservations in favour

of rural candidates. One of the submissions in support of the Government policy was that by and large the people in rural area are poor, that they lack education and live in substandard conditions. The contention that hill and Uttarkhand areas are instances of social and educational backward classes of citizens was accepted on the ground that such areas are inaccessible by reason of which there is a lack of educational institutions and that, "neglected opportunities in remote places raise walls of social backwardness of people". However, the reservation on the ground of poverty in favour of rural people was not accepted for the following reasons (para 29 AIR).

> The reservation for rural area cannot be sustained on the ground that the rural areas represent socially and educationally backward classes of citizens. This reservation appears to be made for the majority population of the State. 80 per cent of the population of the State cannot be a homogeneous class. **Poverty in rural areas cannot be the basis of classification to support reservation for rural areas. Poverty is found in all parts of India.** In the instructions for reservation of seats it is provided that in the application form a candidate for reserved seats from rural areas must submit a certificate of the District Magistrate of the District to which he belonged that he was born in rural area and had a permanent home there, and is residing there or that he was born in India and his parents and guardians are still living there and earn their livelihood there. The incident of birth in rural areas is made the basic qualification. No reservation can be made on the basis of place of birth, as this would offend Article 15.
>
> (emphasis supplied)

In **Vasanth Kumar** (supra), Chinnappa Reddy, J in paragraph 79 observed that, "poverty being the root cause of social and educational backwardness … is not enough to invite constitutional branding, because vast majority of people are poverty struck and some among them are socially and educationally forward and others backward". It was also observed therein that even the majority of the so called social forward classes may be poor but mere poverty cannot be a ground for treating all poor persons as socially backward."

In **Indra Sawhney-I**, Sawant, J after referring to **Chitralekha, Janaki Prasad** and **Vasanth Kumar**, concluded that, "economic or educational backwardness on account of poverty which is not result of social backwardness cannot be criterian for backwardness for Article 16(4) of Constitution of India". The reasons for the same are found in SCC para 484.

> The reasons for discarding economic criterion as the sole test of backwardness are obvious. If poverty alone is made the test, the poor from all castes, communities, collectivities and sections would compete for the reserved quota. In such circumstances, the result would be obvious, namely, those who belong to socially and educationally advanced sections would capture all the posts in the quota. This would leave the socially and educationally backward classes high and dry although they are not at all represented or are inadequately represented in the services, and the socially and educationally advanced classes are adequately or more than adequately represented in the services. It would thus result in defeating the very object of the reservations in services, under Article 16(4). It would, also provide for the socially and educationally advanced classes statutory reservations in the services in addition to their traditional but non-statutory cent per cent reservations. It will

thus perpetuate the imbalance, and the inadequate representation of the backward classes in the services. It is naïve to expect that the poor from the socially and educationally backward classes would be able to compete on equal terms with the poor from the socially and educationally advanced classes. There must be an equality of opportunity for the poor from both the socially advanced and backward classes. There will, however, be no equality of results since the competing capacity of the two is unequal. The economic criterion will thus lead, in effect, to the virtual delection of Article 16(4) from the Constitution.

Jeevan Reddy, J in majority Judgment held that backwardness of citizens cannot be identified only and exclusively with reference to economic criteria and that it is always permissible for the State or other authority to identify a backward class of citizens on the basis of occupation-cum-income without reference to caste but economic criteria can never be sole criteria. (para 799 and 859(4)).

In **Janaki Prasad**, a Constitution Bench of Supreme Court considered the question whether cultivators of land with small holding can be treated as backward class. This question came to be considered while dealing with another aspect of the matter as to whether certain categories included in the backward class list can be said to follow traditional occupations. It was ruled that treating cultivators as socially backward class would amount to creating an artificial group and such exercise would give raise to anamolies. It is apt to excerpt the following passage. (AIR para 32)

> **A class, as already observed, must be a homogeneous social section of the people with common traits and identifiable by some common attributes. All that can be said about the cultivators is that they are persons who cultivate land or live on land, and the simple accident that they hold land below a certain ceiling is supposed to make them a class. In such a case the relevance of social and educational backwardness takes a subordinate place.** In some areas as in Kashmir valley the ceiling for a cultivator is 10 Kanals of irrigated land. If a cultivator holds 10 Kanals of land or less he is to be regarded as backward i.e. to say socially and educationally backward. But if his own brother living in the same village owns half a kanal more than the ceiling he is not to be considered backward. This completely distorts the picture. It will be very difficult to say that if a person owns just 10 kanals of land he should be considered socially and educationally backward while his brother owning half a Kanal more should not be so considered. The error in such a case lies in placing economic consideration above considerations which go to show whether a particular class is socially and educationally backward.
>
> (emphasis supplied)

Therefore, not only B.C.Commission did not adopt proper criteria for identifying social backwardness of Muslim community but adopted such criteria which can only be called economic criteria. The criteria thus evolved by B.C.Commission is irrelevant. Secondly, even while considering the economic criteria, the B.C.Commission misdirected itself in assuming that by reason of occupation, which is not traditional occupation in the true sense of the term,

persons became poor and therefore the entire Muslim community is socially backward. As observed by the Supreme Court any person can be a rickshaw puller, a class IV employee, take to petty job and petty business and there is no prohibition like in a traditional occupation, where members belonging to other groups are not ordinarily allowed to take up traditional occupation like scavenger, barber, carpenter etc.

A Full Bench of this Court in **Narayana Rao**, speaking through Jeevan Reddy, J (as His Lordship then was) did not agree with the reasoning, which is now found in the report of the B.C.Commission. It is apt to quote the following (AIR para 33)

> …In our opinion, the reasoning of the learned Counsel is unacceptable. Barbers, washermen and fishermen among Hindus constitute a homogeneous group a caste, which is also a class within the meaning of Art.15(4) the members whereof follow the particular profession generation after generation and as a matter of customary obligation; they constitute a homogeneous group identifiable by their profession, customs and practices. The same cannot be said of those following similar professions among Muslims. For that matter, any other Hindu belonging to forward classes may also choose to engage himself in any of the said professions but, for that reason he cannot be called a member of the homogeneous class of barbers, washermen, or fishermen, as the case may be. The link between the caste and profession does not exist among Muslims. Indeed, Islam does not recognize caste system at all, as pointed out by the Mandal Commission, though it may be that at the rural level, caste system has percolated to some extent into Muslims too. So far as "Dudekulas" and 'Mehtars' among Muslims are concerned, who can be said to be attached to a particular profession, they have already been included in the list of Backward Classes. **It is not brought to our notice that there is any other group which is situated similarly to "Dudekulas" and "Mehtars"**.
>
> (emphasis supplied)

The above passage would show that the occupational groups among Muslim community were found to be socially backward are already included in the list of backward classes and Muslim community as a whole cannot be branded as socially backward class of citizens. Therefore, the finding that entire Muslim community in socially backward is not based on scientific method nor it is rational. We have already held that as was done earlier by Anantharaman Commission and Muralidhar Rao Commission, if identifiable insular groups among Muslim community, or castes like Dudekula, Pinjari can be identified based on their traditional occupation as socially backward, on the principle of Article 16(4), there cannot be any vice in such a classification treating some occupational groups in Muslim community as socially backward.

Economic backwardness, educational backwardness, poverty, the nature of living conditions, the avocation/job taken up by group of persons would not by themselves can be conclusive of backwardness of such class/community of people. In a given situation if majority of a class are engaged in occupation, which is looked down upon, unremunerative or considered to be mean merely because a certain percentage of persons in such class, are in good economic position, the

whole community cannot be considered as forward. In such a case, entire class may be identified based on caste and applying the criteria in a scientific manner. But when entire religious community is considered backward preponderantly based on only education, economic and employment criteria, without there being any consideration of sub-groups among such community, such an action cannot stand scrutiny of the Court. Even if it is done in a given case, an elaborate investigation, collection and investigation of data in a rational, scientific and objective manner is required to show that the entire community is backward.

In **Vasanth Kumar,** Desai,J cautioned that, "the assumption that all members of some castes are equally, socially and educationally backward is not well founded and that such an approach provides over simplification of a complex problem of identifying the social and educational backwardness" (para 25). While laying down that the expression backward classes used in the Constitution refers only to those who are born in a particular caste or group or who belonged to particular races or tribes or religious minority which were backward, Venkatramiah,J, after referring to the resolution moved by Jawaharlal Nehru in Constituent Assembly on 14.12.1946, observed that, "backward classes are only those castes, races, tribes or communities, which are identified by birth, which are backward. It is, therefore, difficult to hold that persons or groups of persons who are backward merely on account of poverty which is traceable to economic reasons can also be considered as backward classes for purposes of Article 16(4), and Part XVI of the Constitution". (**Vasanth Kumar** para 115)

In coming to the conclusion that persons belonging to Muslim community are not adequately represented in the State employment, again the B.C.Commission considered percentage of the total Muslim employees to the total number Muslims in Government employment.

TABLE II.2. PERSONS IN GOVERNMENT EMPLOYMENT

Description	Total Population	Muslim Population	State Average	Muslim Average
Gazetted	68783	4809	0.09	0.068
Non-Gazetted	531710	52291	0.697	0.675
Class-IV	171605	19282	0.225	0.275
Others	456072	35348	0.59	0.51
Total	1228170	111730	1.61	1.59
IAS	320	8	0.000419	0.000114
IPS	183	5	0.00024	0.0000715
IFS	131	3	0.00017	0.000043
Dist.Judges Gr.I	25	1	0.000033	0.000014
Dist&Sessions Judge Gr.II	109	4	0.00013	0.000057
Senior Civil Judges	120	3	0.000157	0.000043
RDOs	81	1	0.000106	0.000014
DROs	23	1	0.00003	0.000014
Dy.Collectors (other than RDOs)	201	9	0.000264	0.00013
Spl.Gr.Dy.Collectors (other than DROs)	102	5	0.000134	0.0000715
Addl. Dist. Magistrates	47	2	0.000062	0.000028

Mandal Executive Magistrate	1126	89	0.0015	0.0013
Sub-Divl. Police Officers	146	9	0.00019	0.00013

Table II.2 shows number of persons and State/Muslim average in Government employment. While interpreting the statistical figures, one should not forget that the total number of Government jobs in Gazetted, non-Gazetted and Class IV are very few when compared with the total population of the State and total population of the Muslim community. The employment statistics are relevant not for the purpose of identifying social backwardness but to assess whether a given community is adequately represented or not in public services. If a community is not adequately represented in public employment, the same itself cannot be lone factor determinative of social backwardness. A class of citizens, which is socially backward and which is not adequately represented in the services under the State, is alone entitled for special treatment under Article 16(4). It would be constitutionally incorrect to assume that a class of citizens becomes socially backward because such class of citizens is not adequately represented in the services. The inadequate representation of socially backward class of citizens, may be a ground, in addition to other reasons for identifying a class as a backward class. Be that as it is when compared with the total Muslim population, the number of Muslims in Gazetted and non-Gazetted Service is in no way below State average. For instance, for the entire population of Andhra Pradesh of 7,62,10,007, there are 68,783 persons in Gazetted posts whereas for a total Muslim population of 69,86,856, there are 4,809 Muslims in Gazetted posts. The average for total population is 0.09 per cent whereas it is 0.068 per cent for Muslim community. The other figures also suggest that Muslim community cannot be said to be inadequately represented in the services under the State when compared with the total Muslim population. One should not ignore that adequate representation is not proportional representation.

The statistics were obtained from Bureau of Economics and Statistics, Government of Andhra Pradesh. Even this comparison of percentage of total Muslim employees to the total employment of Muslims with the percentage of all other employees to the total number of employees compares very well. Again it is doubtful whether such method is a rationale method. When the total public employment available is 12,28,170 as found by B.C.Commission, it would be very difficult to assume that all the Muslims who are about 9.2% of the total population would have a chance of getting into Government employment. Appropriate method would have been to take an identified backward class from out of the list of backward classes and compare the percentage of Muslim employees in Government employment with the percentage of such B.C. employees, which would have been more rationale method. Further, as per Article 16(4) of Constitution of India if a backward class of citizens is not adequately represented in public employment, the State can provide reservation. The condition precedent for such reservation is identifying backward class of citizens. As pointed out supra, merely because persons belonging to a class or community are not adequately represented in the Government employment, a conclusion that the entire class is backward is not appropriate.

WHY REPORT OF B.C.COMMISSION IS DEFECTIVE?

There are good reasons to come to the conclusion that the sampling and analysis of the data is defective, that the B.C.Commission failed to determine satisfactory normative standards (criteria) and that the conclusion by the commission is not preceded by any scientific method of study. Indeed at page 52 of its report, the Commission expressed its inability to undertake a comprehensive study as, "it was not practicable to undertake an elaborate census. On this admitted position, we cannot countenance submission of State that B.C.Commission determined the reference by constitutionally acceptable method."

We will consider and sum up reasons for saying that B.C.Commission study was unscientific, one after the other. Before doing so, we remind ourselves that when statutory commission is entrusted with duty to identify backward classes and advise the government, ordinarily the Court is precluded from doing detailed review "assessment of facts" by the fact finding body. We held that secondary review by Wednesbury principle applies. We just did that. It does not, however, mean that an analysis by Court is not warranted even when, "the criteria applied for identifying the backward classes is either perverse or *per se* defective or unrelated to such identification." A detailed review is also not excluded when, "the criterion is calculated to give, by the very nature of the criterion, a contrary or an unintended result." In such an event, judicial scrutiny can even extend not only to procedure but content and substance of the report. (**Indra Sawhney I** Para 530).

i) The B.C.Commission has evolved such criteria, which can only be relevant to some extent for the purpose of study of educational and economic position of Muslim community. No criteria was formulated for the purpose of identifying social backwardness. By arriving at a conclusion that a community is educationally and economically backward or majority of the people are below poverty line/double poverty line, it cannot always be assumed that such community is socially backward. The Supreme Court in various decisions has indicated the tests (though not as normative criteria) to be applied for determining social backwardness of a class/caste/community. Such consideration is conspicuous by its absence in the report of the B.C.Commission. We have already discussed this aspect of the matter from a different point of view and it is not necessary to repeat the same.

ii) The Supreme Court in **Sagar** invalidated the government' exercise in identifying the backward classes observing that availability of material with the government is not a factor to validate the law but the demonstration by evidence can only ensure such validation. In paragraph 9 of the said Judgment (AIR), the Supreme Court made the following observations.

> **But whether in that examination the correct criteria were applied is not a matter on which any assumption could be made especially when the list prepared is ex facie based on castes or communities and is substantially the list which was struck down by the High Court in P.Sukhadev's case.** 1966-I Andh WR 294. Honesty of purpose of those who prepared and published the list was not and is not challenged, **but the validity of a law which apparently infringes the fundamental rights of citizens cannot be upheld merely because the law maker was satisfied that what he did was right or that he believes that he acted in manner consistent with the constitutional guarantees of the citizen. The test of the validity of a law alleged to infringe the fundamental rights of a citizen or any act done in execution of that law lies not in the belief of the maker of the law or of the person executing the law,**

but in the demonstration by evidence and argument before the Courts that the guaranteed right is not infringed.

(emphasis supplied)

iii) The B.C.Commission referred to earlier such commissions and without giving any reasons for selecting such, adopted six point criteria, as already mentioned supra. After perusing the report – it was also pointed by the learned Counsel for the petitioners – we find that there was no proper study of the issue even with reference to all the criteria; only few of them like engaging in cultivation as occupation, class IV government service etc., were considered. We therefore cannot but observe that the conclusion by the Commission is constitutionally unacceptable *ipsi dixit* of the commission.

iv) The sample design and sample size chosen by the B.C.Commission as discussed supra is misleading and disproportionate to the total population of Andhra Pradesh and does not reflect the actual distribution of population. The entire analysis is done based on attribute-wise Muslim population as a proportion to the attribute-wise total population, which is not statistically valid to determine the social backwardness with reference to the parameters considered by the B.C.Commission. The non-consideration of the total admissions in minority institutions and the calculation of percentage gap is defective. For instance, applying the formula evolved by the B.C.Commission for calculating Muslim percentage and percentage gap, about 66 per cent of Muslim population is graduates, which is very significant. If percentage gap is calculated first by considering actual population in the relevant age group for each community, and then calculate the variance among other communities, the method would have been more scientific. When statistical parameters are considered, the comparative backwardness would be more appropriate than comparison between the minority group on one side and all other groups on one side. These are some of the incurable defects in the study undertaken by the B.C.Commission to determine socio-economic backwardness of Muslim community.

v) The method and manner adopted by B.C.Commission in submitting its report was almost similar to the study by Commissionerate of Minorities Welfare. The report of the Commissionerate was the basis for the issue of G.O.Ms.No.33 dated 12.7.2004 providing 5% reservation to Muslim minorities, which was in challenge before this Court. The full Bench of this Court in **Muralidhar Rao** did not agree with procedure and methods adopted by the Commissionerate and its conclusions based on such method. We shall deal with this matter in brief. The Commissionerate was asked to study socio-economic conditions of Muslim minority community in the State. The occupation profile, income tax pattern and social activities were the three key factors, which were taken into consideration by the Commissionerate. (see Government Order No.33, extracted supra). After that, the Commissionerate thought it fit to take into account data on the enrolment of Muslims in Industrial Training Institutes, Polytechnic Colleges, Junior/Degree Colleges, Medical & Engineering Colleges and P.G. Courses in Universities. This data was mainly drawn on a survey by the three District Minorities Welfare Officers and also a study made by A.P. Industrial and Technical Consultancies Organization (APITCO). After analyzing the data, the Commissionerate came to a

conclusion that Muslims are below average when compared with the total Muslim population. Then the Commissionerate conducted a case study of Kurnool District for the purpose of employment position of Muslims in public sector and concluded that Muslims have inadequate share in employment. It also noticed that Muslims are poorly represented in Parliament, State Assembly and other elected Bodies. On these parameters, the Commissionerate concluded that "the main reasons for backwardness among Muslim minorities are poor economic status, illiteracy particularly among women, inadequate representation in employment, limited representation in local bodies and political spheres" and therefore, it recommended 5% reservation to Muslim community. The full Bench in **Muralidhar Rao** (see Judgment of Sudershan Reddy,J) framed question No.3 dealing with the aspect as, "Whether the process of identification of Muslims as backward classes of citizens by the Commissionerate of Muslim Minorities Welfare is vitiated?"

In **Muralidhar Rao** after the analysis of the report of Commissionerate of Muslim Minorities Welfare called "Socio Economic conditions of Muslim minorities in Andhra Pradesh" this Court came to the conclusion that (i) the report does not contain the details of any investigation or enquiry as regards the backwardness of Muslim community (ALD para 122); (ii) the study undertaken was not for the purpose of identification of the Muslim community as a backward class for the purpose of Articles 15(4) or 16(4), and relevant material and previous studies were not taken into consideration (ALD para 130); (iii) the Commissionerate did not make scientific or reasoned investigation or enquiry, that it did not take into consideration the relevant factors, that it did not apply mind and that it acted in undue haste in submitting the report. (ALD para 132) and (iv) the Commissionerate did not record any finding as to social backwardness of Muslim community. (ALD para 133).

The full Bench also observed that in the absence of laying down the criteria for ascertaining the backwardness, the entire report is to be treated as an exercise in futility. The Bench also did not agree with the opinion of the Commissionerate that the Muslim community is not adequately represented in public employment (ALD para 137). As the decision of the government in G.O.Ms.No.33 was entirely based on the report and no other material, the full Bench came to the conclusion that the impugned order, "does not stand on its own".

We find that there are glaring similarities in the approach, analysis and conclusions arrived at by the Commissionerate of Muslim Minorities Welfare and the B.C.Commission headed by Justice Subrahmanyam. In the method of analysis the statistical data and drawing inferences without there being normative standards and conversion of sample to universe, both have similarities. Nextly, the observations made in both the studies appear to be similar. For instance, at page 5 of the report, "socio economic conditions of Muslim minorities in Andhra Pradesh"[1], the Commissionerate made the following observations.

> **Economic Development**: The occupational profile of Muslim minorities revealed that about 45% of Muslims are engaged in petty business activity like Pan shops, Tarkari vendors, Flower, Fruit Vendors, Kirana, Chai dukan etc.,
>
> Around 40% Muslims are engaged in service activities like automobile repairs, watch sales & servicing, TV & Radio Servicing, Videographers, Photo studios, Engineering works, Shamiyana & Tip Top suppliers etc., Around 10% are engaged in activities like

Agricultural, Dairy, Bakeries etc.

The B.C.Commission made the observations at pages 77 and 80 of the "Report on inclusion of Muslim Community in the list of Backward Classes in the State of Andhra Pradesh". We have referred to conclusion of the Commission supra and it is not necessary again to extract these passages from the report of the Commission.

A comparative reading of both the reports and paragraphs 122 to 124, 130 and 132 of **Muralidhar Rao** (Judgment of Sudershan Reddy,J) would compel us to conclude that for the same reasons which weighed this Court in **Muralidhar Rao**, the report of the B.C.Commission cannot be sustained, as it is vitiated by application improper criteria, non-consideration of relevant factors and unscientific and unreasoned method of investigation enquiry. We do not wish to reiterate the reasons indicated supra for coming to such conclusion. For all the above reasons, We have no hesitation in recording a finding against a State that the impugned Ordinance is violative of Articles 15(4) and 16(4) of Constitution of India.

Part VI

ISSUE UNDER ARTICLES 15(1) AND 16(1)

Any discrimination among two groups of people belonging two different religious communities would violate Articles 15(1) and 16(2) of Constitution of India. Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth, though by reason of Article 15(4), a State is enabled to make special provisions for advancement of socially and educationally backward classes of citizens. Article 16(1) declares that there shall be equality of opportunity for all citizens in the matters relating to public employment. For decades, it was thought that Article 15 and 15(4) also operate in the field of education enabling the State to provide for reservations in educational institutions. Article 16(1) and 16(4) are explicit that the covered area by the said Article is public employment. What was thought of about article 15(4) was finally settled in **Ajay Kumar Singh v State of Bihar**, when the Supreme Court ruled as under. (SCC para 4)

> It is true that clause (4) of Article 15 does not expressly authorize providing of reservations in educational institution but it is too late in the day to question this power. Article 15(4) says that nothing in Article 15 or in clause (2) of Article 29 shall prevent the State from making "any special provision" for the advancement of classes mentioned therein. The words "any special provision" are of wide amplitude and do certainly take in a provision reserving certain number of seats in educational institutions. Indeed, the first major case arising under Article 15 before this Court [**Balaji,** (supra)] was one relating to reservation of seats in educational institutions. At no time was it questioned that such a course was not permissible, evidently in view of the width of the words "any special provision" occurring in Article 15(4).

When the State fails to show that a particular class of citizens or religious community is backward class within the parameters laid down by the Supreme Court over a period of time, this Court has to infer that the classification is suspect of being violative of Articles 15(1) and 16(2). It is argued by the learned Advocate General that the State identified a class of citizens as backward class and merely because they are labelled as Muslim community, such classification does not

impinge equality rights of the petitioners. According to petitioners, it is discrimination of other classes of citizens based only on religion. This submission of Ordinance being suspect of invidious religious classification needs a nano-scrutiny as it has potentiality of being a seminal question than mere ground of invalidation.

We have already attempted an analysis of the impugned Ordinance. A reiteration of the same may be necessary again. After issue of Reservation Order in 1970, the Government amended the order number of times adding some more classes of citizens to the list of backward classes. The State never attempted to promulgate Ordinance or enact a Law to declare a class of citizens as backward class and then provide reservations in educational institutions and public employment. For the first time in the State of Andhra Pradesh – may be in Indian Republic; the State chose legislative route for declaring a minority community as backward class of citizens and provide reservations at five per cent. Such legislation immediately becomes suspect of being inconsistent with Articles 14, 15(1) and 16(2) of Constitution of India. Indeed, one of the Senior Counsel also attacked the Ordinance as being a piece of constitutional impropriety for amending an executive order by an Ordinance under Article 213 of Constitution of India. Be that as it is, the title of the Ordinance itself shows that it is 'an Ordinance to provide reservation to Muslim community'. The preamble of the Ordinance is 'predetermined objective oriented' in the sense, it was preceded by a single point refers to B.C.Commission as to whether Muslim community can be treated as backward classes. The collection, analysis of data and findings aimed at only one targeted group which is a religious community and the recommendation was religion specific to include Muslim community in the list of backward classes. Apart from these external aids, there are internal aids as well to aid to interpretation. The heading of Section 3 reads "Declaration of Muslims as backward classes". Section 3 declares "the members of Muslim community residing the State" as backward classes to be included in the lists of backward classes.[117] Section 4 with its proviso and Section 5 with its proviso lay down that five per cent reservation is provided "in favour of Muslims residing the State" excluding "the creamy layer amongst Muslim community". We have, therefore, no manner of doubt that the impugned Ordinance was promulgated for declaration of Muslims as backward classes and for reservation of seats for Muslims in educational institutions and in appointment in public services. No doubt, Section 3 begins with phrase "having regard to the social, educational and economic backwardness…" but if Section 3 on a strict and searching scrutiny fails to answer the tests under Articles 15(4) and 16(4), nothing remains to indicate that the Ordinance is intended to provide reservations to a backward class of citizens which incidentally belong to Muslim community.

India is secular republic. Constitution injuncts the State to be religion blind in its actions, but confers a fundamental human right (Articles 25 to 28 of Constitution of India) on all persons freedom to profess, practice and propagate any religion. Secularism is basic feature of the Constitution of India. (See **S.R.Bommai v Union of India**). If State action tends to stratify religious groups for conferring State largess or benefits or for burdening them without justifiable reasons, it would be *ex facie* discrimination on grounds of religion. It is to be abhorred. If the State moulds its policies based only on religion, it would be a mockery of trinity provisions of equality (Articles 14, 15 and 16). By reason of Articles 29, 30, 44 and 372 of Constitution of India, the State is always entitled to

adopt seemingly discriminatory policy in relation to various religious communities if such a thing is not based only on the ground of religion. Every State action must be informed by reason and such reason must stand the scrutiny of the Court in primary review and/or secondary review. It would not be necessary to refer to these aspects for the purpose of this consideration of the point. The following case law would support the view that any classification based only on religion would be discriminatory violating Articles 15(2) and 16(1) of Constitution of India. Preferring members of any community or class for no reason other than religion is discrimination for its own sake prohibited by Articles 15(1) and 16(2). If caste in a religion or occupational group in a religion plus something can justify such preference, it might be free from criticism that such discrimination is pernicious.

In **State of Rajasthan v Thakur Pratap Singh**[118], the fact of the matter was this. Section 15 of Rajasthan Police Act empowered the Magistrate to deploy additional police force in an area proclaimed to be disturbed or dangerous area and collect the cost of such additional force from the inhabitants. The Law also enabled the State Government to exempt any persons or class of inhabitants from the liability to bear the costs. In exercise of the powers under the said provision, the Government of Rajashtan declared twenty-four villages as disturbed areas for a period of six months and permitted the Inspector General of Police to deploy additional police force at the cost of the inhabitants while exempting Harizan and Muslim inhabitants from bearing the costs. This notification of the Government was successfully assailed before the High Court as violating guarantee under Article 15(1) of Constitution of India. Before the Supreme Court, it was contended by the State that the impugned notification was not based only on the ground of caste or religion but on the ground the persons belonging to Harizan and Muslim communities were found not to have been guilty of the conducting necessitating additional police force. Repelling the contention, the Supreme Court did not accept and came to the conclusion that in the absence of any material that other class of persons are not peace loving, such exemption cannot be granted. The Supreme Court deprecated 'religion specific' classification in the following terms. (AIR para 9)

> It would be seen that it is not the case of the State even at the stage of the petition before the High Court that there were no persons belonging to the other communities who were peace-loving and law-abiding, though it might very well be, that according to the State, a great majority of these other communities were inclined the other way. If so, it follows that the notification has discriminated against the law-abiding members of the other communities and in favour of the Muslim and Harijan communities, - (assuming that every one of them was "peace loving and law-abiding") on the basis only of "caste" or "religion". If there were other grounds they ought to have been stated in the notification. It is plain that the notification is directly contrary to the terms of Art. 15(1), and that para 4 of the notification has incurred condemnation as violating a specific constitutional prohibition. In our opinion, the learned Judges of the High Court were clearly right in striking down this paragraph of the notification.

Triloki Nath Tiku v State of J&K[119] is a case, which arose under Article 16(2) and 16(4). The petitioners complained that they were denied promotion to gazetted posts in Education Department based on the seniority wherein junior members were placed above the petitioners in Kashmir Province only on the ground that they belong to Muslim community and in the State of

Jammu, the junior members were placed above them based on the religion, i.e. Muslim community. The State projected justification contending that Muslims as a community in the whole of State of Jammu and Kashmir formed backward class of citizens and they were not adequately represented in the services under the State. It was also urged by the State that in the Province of Jammu, Hindus formed backward community and were not adequately represented. The Constitution Bench of the Supreme Court declared impugned reservations contrary to the provisions of Article 16(1) are void. It was laid down, thus:

> Article 16 in the first instance by Cl. (2) prohibits discrimination on the ground, inter alia, of religion, race, caste, place of birth, residence and permits an exception to be made in the matter of reservation in favour of backward classes of citizens. The expression "backward class" is not used as synonymous with "backward caste" or "backward community". The members of an entire caste or community may in the social, economic and educational scale of values at a given time be backward and may on that account be treated as a backward class, but that is not because they are members of a caste or community, but because they form a class. In its ordinary connotation the expression "class" means a homogenous section of the people grouped together because of certain likenesses or common traits, and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. But for the purpose of Art 16 (4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution.

In **R.C.Poudyal v Union of India**[120], a Constitution Bench of the Supreme Court considered, *inter alia,* the question whether reservation of one seat for Sangha class of people in Sikkim to be elected by electoral college of Lamaic Monastris is based purely on religious distinction and therefore unconstitutional as violative of Articles 15(1) and 325 of Constitution of India[121]. Chief Justice L.M.Sharma and Agrawal,J in their separate dissenting opinion held that allowing a seat in the Legislature to represent religious institutions is bad and that the existence of such provisions is bound to give raise to similar demands by following other religions and of the demand for reservation of seats on religious grounds. The majority view by Venkatachaliah,J (as his Lordship then was) held thus (SCC para 137):

> Indeed, the provision bears comparison to Article 333 providing for representation for the Anglo-Indian community. So far as the provision for the Sangha is concerned, it is to be looked at as enabling a nomination but the choice of the nominee being left to the 'Sangha' itself. **We are conscious that a separate electorate for a religious denomination would be obnoxious to the fundamental principles of our secular Constitution. If a provision is made purely on the basis of religious considerations for election of a member of that religious group on the basis of a separate electorate, that would, indeed, be wholly unconstitutional.** But in the case of Sangha, it is not merely a religious institution. It has been historically a political and social institution in Sikkim and the provisions in regard to the seat reserved admit of being construed as a nomination and the Sangha itself being assigned the task of and enabled to indicate the choice of its nominee.

(emphasis supplied)

As we have mentioned earlier the entire exercise is aimed at providing reservations for Muslim community as persons belonging to a religious minority. We, therefore, hold that the distinction is made based only on religion and there was no other reason much less valid constitutional reason warranting such extreme policy of preference to them. We accordingly hold on this point against the State.

Part - VII

OTHER COLLATERAL ISSUES UNDER ARTICLE 14

Some of the learned counsel for petitioners also raised other contentions like the applicability of rule of reservation with prospective effect which we do not propose to consider in these matters. In appropriate cases, such an issue has to be considered having regard to the law declared by the Supreme Court. In this part, we propose to take up other submissions which were pressed before us by some of the learned counsel for the petitioners as well as respondents. It would be convenient to deal with the contentions under different sub-headings.

1. THE ISSUE OF DISCRIMINATION

In the march of Law as a Universal Constitutional principle, equality has in its interpretative phase progressed with giant strides. One need not travel beyond Indian shores in search of authorities to assert that equality before law and equal protection of laws in Article 14 have omnipresent and omnipotent influence on all State actions and private endeavours. As a ground of challenge in the Court arena equality furnishes different swords with varying sharpness. A facet or two of equality already finds place in this Judgment supra. We are aware that when affirmative State action is challenged, the State has to demonstrate the rationale and reason for determining a class of citizens as backward class for special treatment and must show that such action does not impinge upon principle of equality. A separate challenge based on Article 14 may not arise. Indeed, Jeevan Reddy,J speaking for the Full Bench in **Narayana Rao** (supra), observed that, "a provision made with reference to, and under Articles 15(4) and 16(4) need not again be tested on the touchstone on Article 14 as it would be unnecessary and superfluous exercise and reasonableness and absence of arbitrariness that pervade Articles 14, 15 and 16 equally pervade Clause (4) of Article as well". However, in this part, the questions are little different which not only pertain to the question of impropriety and discrimination but the method and manner of providing reservations for Muslim community.

At one stage, the Government referred the issue to Commissionerate of Minorities Welfare headed by Secretary to Government by issuing an executive order being G.O.Ms.No.15 dated 04.06.2004. The Commissionerate submitted a report within less than a month which culminated in the issue of G.O.Ms.No.33 dated 12.07.2004. The same was invalidated by a Full Bench of five learned Judges of this Court. By that time, the claim of large number of communities was pending before the government for inclusion in the lists of backward classes. The

Government cannot deny this. The Government through its Principal Secretary, Backward Class Welfare Department again made single point reference under Section 9(1) of B.C.Commission Act, to Commission which came into existence recently. The learned counsel for the petitioners would argue that when the State was bound to treat different classes of citizens belonging to different communities equally under Article 14 treating Muslim community alone as a class of citizens and making a reference to B.C.Commission fails to satisfy the twin tests of classification. Reference is made to **Ramakrishna Dalmiya v Tendulkar**[122] and in **Re Special Courts Bill**[123]. It is no doubt true that in all matters State has to treat all classes of citizens equally without any discrimination. If exigencies so warrant a class of citizens can be treated differently at the stage of proposals, at the stage of consideration and at the stage of decision making provided such differential treatment has some nexus with the object sought to be achieved. The good intention of the Government cannot be the basis to infer the nexus with the object sought to be achieved. The good or bad of State action does not always depend on political expediency which in a democratic system cannot be ignored. The question, however, remains whether there was any justification for the Government to have made a special reference to B.C.Commission.

It is not denied that while setting aside G.O.Ms.No.33 dated 12.07.12004, this Court issued directions, *inter alia,* commanding Government of Andhra Pradesh to reconstitute B.C.Commission within a period of three months and initiate the process of consultation and seek the opinion of the Commission for inclusion of the Muslim community in the list of backward classes. The B.C.Commission was also directed to decide the reference within a period of six months from the date of the request by the State Government. No one can disagree that the orders of the highest Court of the State of Andhra Pradesh in a case where the State is a party are to be implemented without any demur. But how the orders are implemented should be above any criticism of being improper and discriminatory. This Court did not prevent the Government of Andhra Pradesh from seeking a reference with regard to the inclusion or exclusion of all other communities, which is pending with the Government to the B.C.Commission. The Government, however, chose to make reference with intention of providing reservation to Muslim community. This in our opinion does not – though it has seeds of impropriety; in any manner impinge on Article 14 of Constitution of India. In constitutional law, the question of impropriety or propriety does not necessarily determine validity or invalidity of the legislative exercise. The Constitution entrusts the legislative functions to duly elected legislative bodies. When, how and what is to be done is the unquestionable prerogative of the State Legislature. Nobody dictates to the Legislature what to do and what not to do for Legislature is creator of Law and the Court only destroys such Law after it is made if found to be fraud on power. It is accepted principle that legislature makes Law and Court declares what the Law is.

Any classification – it is trite to say so; should also be reasonable and must not be patently arbitrary. It must be rationale and must be based on some qualities or characters which are to be found in all groups together and not in others, who are left out. But those qualities or characters must have a rationale objective or relation. It is equally well settled that when a Legislation is intended for achievement of a particular object, the purpose need not be all embracing. In **Sakhavant Ali v State of Orissa**[124], the Supreme Court explained this in the

following manner.

> The simple answer to this contention is that legislation enacted for the achievement of a particular object or purpose need not be all embracing. It is for the Legislature to determine what categories it would embrace within the scope of legislation and **merely because certain categories which would stand on the same footing as those which are covered by the legislation are left out would not render legislation which has been enacted in any manner discriminatory and violative of the fundamental right guaranteed by Article 14 of the Constitution.**
>
> (emphasis supplied)

We accordingly reject submission of the learned counsel for petitioner. In the scheme of B.C.Commission Act, Government's endeavour to seek advice on social status of a particular class of citizens does not render consequent action, illegal and unconstitutional.

2. EXCESS RESERVATION AND DOCTRINE OF SEVERABILITY

This point requires consideration of two aspects. Accepting the recommendation of B.C.Commission, the impugned Ordinance provides 5% reservation for Muslims over and above the existing 46% reservation. With this, 51% of the positions in educational institutions and public employment would become reserved. According to the learned Counsel, reservation of 51% is unreasonable and violates Articles 15(4) and 16(4) as well as **Balaji** principle approved by **Indra Sawhney I**. **Per contra**, two submissions are made on behalf of the respondents. The learned Advocate General for the State would contend that provision of reservations for Muslims by declaring them as backward is valid. The same cannot be defeated by the quantum of reservation provided, in which event, the Court can always approve the reservations in favour of Muslims and leave it to the State to work out the percentage of reservation in the manner construed by the Court. So to say as an alternate submission he would urge to consider retaining Section 3 and severing Sections 4 and 5 of the Ordinance which provides 5% reservation. The other learned Counsel supporting the Ordinance are emphatic that provision of 51% reservation including 5% for Muslims does not in any manner impinge the law declared by the Supreme Court. According to the learned Counsel, the extra 1% is saved by the prevalent "extraordinary situation" referred to by the Supreme Court in paragraph 810 of **Indra Sawhney I**. Sri R.K.Dhawan, learned Senior Counsel appearing for one of the interveners in W.P.No.13832 of 2005 would urge that the excess over 50% being only 1% is '*de minimis*', that Muslim population being 9.25%, provision of 5% reservation to them cannot be said unjustified and that percentages are to be reviewed on periodical basis and therefore, would not furnish the valid ground for invalidation of the Ordinance. We may mention that doctrine of '*de minimis*'[125] has no application when the constitutional guarantee to equality and equal protection of laws is flouted with impunity, without any justification. If 1% excess reservation cannot be sustained on any such ground, *de minimis* is not available. (See **Indian Bank's Association v Devkala Consultancy Service**[126].)

In **Balaji**, the Supreme Court adverted to question of reasonableness of reservation exceeding 50%. On the premise that Clause (4) of Article 15 and Clause (4) of Article 16 being in the nature of exception, it was held that a special provision contemplated under these clauses must be within reasonable limits. The Court then observed that, "speaking generally and in a broad way, a special

provision should be less than 50%; how much less than 50% would depend upon the relevant prevailing circumstances in each case". The view that enabling provision in two articles is an exception was not accepted in **Thomas**. But, rule of 50% reservation survived in **Thomas**, **Vasanth Kumar** and **Indra Sawhney I**. In the last cited decision, majority explained this rule as under. (SCC para 810)

> While 50% shall be the rule, it is necessary not to put out of diversity of this country and the people. It might happen that in farflung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, **some relaxation in this strict rule may become imperative**. In doing so, extreme caution is to be exercised and a special case made out.
>
> (emphasis supplied)

In extraordinary situations, when people need to be treated in different way "relaxation in the strict rule may be imperative" (see above passage). In this case before us, whether there is any such extraordinary situation warranting such relaxation? The Supreme Court indicated one test for deciding the validity of excessive reservation i.e., if people are out of mainstream of national life and live in peculiar conditions, justifiably there can be reservation over and above 50%. Such a situation, we are afraid, cannot be assumed in the matter of provision of reservation for identified groups among minorities. The theory that reservation of half of total percentage of the backward class population is reasonable is stated to be rejected because when you apply relaxation rule, the same would be detrimental, in such a situation and revives theory of proportionate reservation which was not accepted by Supreme Court.

Doctrine of severability and doctrine of reading down are two techniques in constitutional litigation adopted by the Court. Any legislation carries with it a presumption as to its constitutionality. Therefore, so as to save the legislation, it is permissible for the Court to strike down that part of the legislation, which cannot be constitutionally sustained. When the doctrine of reading down is employed, the Court does not strike down the offending portion of legislation but interprets such offending portion to be in tune with the Constitution. The argument of learned Advocate General, as noticed already, presupposes that Section 3 declaring Muslims as backward class is sustainable and Sections 4 and 5 are severable. We are afraid, in this case, it is not permissible, as core provision of the Ordinance failed to satisfy all tests of constitutionality.

In **Motor General Stores v. State of A.P.**[127], we find the following passage, which does not support proposition of learned Advocate General.

> A statute bad in part is not necessarily void in its entirety. **Provisions which are within legislative power and which are otherwise in conformity with the Constitution may survive if they are capable of being separated from the bad. But a provision inherently unobjectionable cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the Legislature intended the provision to stand, in case others included in the statute and held bad should fall** (see **Dorchy v. Kansas**, 264 US 286). The general rule is that when a provision which is in the nature of an exception to a general statute is invalid, the general provisions of the statute are not invalidated thereby, unless it clearly appears that the exception is so intimately

and inherently related to and connected with the general provisions to which it relates that the Legislature would not have enacted the latter without the former.

(emphasis supplied)

Applying the above principle, we are convinced that Sections 4 and 5 entirely depend on Section 3 and if Section 3 goes, nothing remains in the impugned Ordinance and therefore, the entire Ordinance must suffer invalidation.

3. IMPROPRIETY OF REFERENCE UNDER THE ACT

The learned counsel for the petitioners argued that the Government can undertake periodic revision of backward classes lists after expiration of ten years and before the expiration of such period, it was not proper for the Government to make a reference to B.C.Commission. According to the learned counsel when large number of communities approached the Government for inclusion in the backward classes lists, the Government acted illegally in ignoring their request and made a reference only regarding Muslim community. The counsel rely on Sections 9 and 11 of B.C.Commission Act. We are afraid this submission is misconceived.

Section 9 and 11 are found included in Chapter III of the Act with a heading "Functions and Powers of the Commission". Section 9(1) of the act casts a duty on the Commission (i) to examine requests for inclusion of any class of citizens as backward class; (ii) to hear complaints of over inclusion or under inclusion on any backward class and (iii) tender advise to the Government on inclusion, under-inclusion or over-inclusion of backward classes. Apart from this, under sub-Section (2) of Section 9, the Commission is also enjoined with duty to make recommendations on any other matter that may be referred to it by the Government and as per sub-section (3) of Section 9, the Commission can make an interim report in regard to any castes or classes in whose cases urgent action is required under the Act. Here, we may read Section 11 of the Act.

> 11. **Periodic revision of list by the Government:-** (1) The Government may at any time, and shall, at the expiation of ten years from the coming into force of this Act and every succeeding period of ten years thereafter, undertake revision of the lists with few to excluding from such lists those classes who have ceased to be backward classes or for including in such lists new backward classes.
>
> (2) The Government shall while undertaking any revision referred to in sub-section (1) consult the commission.

Sub-section (1) of Section 11 is in two parts. One is enabling part and the other part is mandatory part. Under enabling part, it is permissible for the Government at any time to undertake revision of the lists with a view to exclude some such classes who have ceased to be backward classes or for including new classes. Under mandatory part, the Government shall at the expiration of ten years after coming into force of the Act and every succeeding period of ten years thereafter undertake the exercise of revision of lists. If the argument that the Government can undertake the exercise of inclusion or exclusion only once in ten

years is accepted, the same would render the enabling part in Section 11(1) of the Act, otiose. It is now settled principle of statutory interpretation that the Legislature is presumed to have used every word, every phrase and every sentence in a provision in an appropriate manner to convey appropriate meaning. Legislation is presumed to have not used any words unnecessarily. It is no doubt true that the Principal Secretary to the Government in Backward Class Welfare Department made a reference to the B.C.Commission under Section 9(1) of the Act. On reading of Sections 9(1) and 11(1) of the Act together we do not find any impropriety nor there is any illegality in making reference as is done in this case. We are of the opinion that Section 9(2) empowers the government to make a reference to B.C.Commission when micro level enquiry is taken up whereas Section 11(1) enables the Government to make a reference for revision of lists at any time when it undertakes either micro level or macro level revision. For these reasons, we are not able to countenance submission of petitioners in this regard.

4. WHETHER B.C.COMMISSION IS EXPERT BODY

In W.P.No.13894 of 2005 (ground x) and in W.P.No.14959 of 2005 (ground xi), a specific plea is taken that A.P. Backward Classes Commission (the third respondent) in both the writ petitioners, is not an expert body, that it is not having any expert member and that it has members belonging to party in power. The B.C.Commission has filed counter affidavit through its Member Secretary. In paragraph 4 of counter, while giving the background and bio-data of members of the Commission. Though the petitioners have adverted to this aspect in the pleadings, no attempt was made at the Bar to substantiate the plea. Therefore, we decline to record any finding on this. We may, however, observe that as repeatedly observed by the Supreme Court in various Precedents, the identification of backward class of citizens is a complex socio-economic exercise involving scientific study. When such study is entrusted to a Commission appointed by the Government, the Government must ensure that such exercise is not an empty formality nor routine exercise. All the members so appointed must have background in the fields of social science research, anthropology, sociology, economics and demography. One should not forget that in **Vasanth Kumar**, Supreme Court observed that Judges – including High Court Judges; are least expected of undertaking such study, though there might be exceptions where in their extra judicial pursuits, some Judges take to the study of other subjects. On this aspect, we leave the matter reiterating the Supreme Court dicta in **Indra Sawhney-I** that, “the Commission must be composed of experts vested with the

necessary powers to make proper and effective enquiry".

5.FINDINGS OF NATIONAL COMMISSION

The learned Senior counsel for the petitioner in W.P.No.13894 of 2005, Sri K.Ramakrishna Reddy, submits that National Commission for Backward Classes (National Commission) gave an advice to the Central Government being NCBC Advice No.AP.64-67/2002 dated 04.07.2002, rejecting the request of Muslim community for inclusion in Central list of Backward Classes for Andhra Pradesh and the B.C.Commission did not even consider this aspect of the matter. The report of the National Commission including the findings is placed before this Court. A perusal of the same would show that the request of four individuals/organizations for inclusion of Muslim community of A.P. in the list of backward classes was considered along with other requests for inclusion of Muslim communities like "Quresh", "Muslim Katika" and "Mevafarosh" was considered by the National Commission. After referring to Anantaraman and Muralidhara Rao Commission and noticing that there are twenty-four Muslim castes/communities in Andhra Pradesh as per Anthropological Survey of India's Publication 'India's Communities', the Commission rejected the request for inclusion of Muslim in the central list of backward classes as it is not a socially homogenous class or community. The Commission observed in the said report that, "Muslim community is not a socially homogenous class or community, and that many of the Muslim groups or sections among Muslims enjoy high social status". It was also recorded that Muslims are not eligible for inclusion in the list of backward classes under Articles 15(4) or 16(4) of Constitution of India.

The findings of the National Commission would belie any contention that there are no castes/communities in Muslim Minority and that Muslim community is a homogenous class. As per Article 340 of Constitution of India, the National Commission is required to advise and recommend to the President of India for taking such steps for the uplift of backward classes. Hence, the findings of the National Commission cannot be likely brushed aside. The B.C.Commission's recommendations to include Muslim community in the list of backward classes runs counter to the recommendation made by the National Commission.

PART VIII

SUMMARY OF CONCLUSIONS

In an exercise of this nature; writing a Judgment in a case with factual and

legal complexities – there are bound to be issues resolution of which depends on subtle jurisprudential principles. There are, therefore, bound to be repetitions in evaluation of facts, citation of precedents and in the matter of drawing inferences and conclusions. Though, it is not intended to preclude the reader from perusing the entire Judgment, we feel it appropriate to sum-up the important conclusions for ready reference.

First, we have to observe that in the long history of reservation policy in the State of Andhra Pradesh, Anantaraman Commission and Muralidhara Rao Commission rejected the claim of the entire Muslim community for inclusion in the list of Backward Classes. The former received the approval of the highest Court of the land in **Balaram**. There was a specific reference to Muralidhara Rao Commission to examine social and educational backwardness of minority communities for the purpose of including them in the lists of backward classes. The Commission opined that none of the groups or classes among Muslims or any other minorities can be included in backward classes except "Mehtars" and "Dudekulas". This was accepted by the Government. When this was challenged before the Full Bench in **Narayana Rao**, this Court approved the recommendation of Muralidhara Rao Commission as well as the decision of the Government. In 1994, there was an attempt by the Government to include, among others, Muslims in the list of backward classes in vain, by reason of a Full Bench Judgment in **A.P.S.B.Welfare Association**. Yet another attempt, to include Muslims in the list of backward classes in 2004 preceded by the report of the Commissionerate of Minorities was also not accepted by another Full Bench of five learned Judges of this Court in **Muralidhar Rao**. In view of this, it is incumbent on the State to apply strict standards before issuing any Ordinance. The State has failed to prove the existence of conditions for granting the constitutional reservations to Muslim community.

Secondly, having regard to the Constituent Assembly Debates when Article 16(4) was enacted, as interpreted by seven Judge Bench of the Supreme Court **Venkataramana,** we are of the considered opinion that initially Article 16(4) was not intended to confer any benefit on backward class of citizens belonging to minorities; it was intended only for backward class communities among Hindus. By reason of purposive interpretation in **Balaji**, **Vasanth Kumar** and **Indra Sawhney-I,** backward class of citizens based on occupations and other factors among Muslims can be considered for the purpose of reservations under Articles 15(4) and 16(4). The dicta of the Full Bench in **Muralidhar Rao** has to be understood in the background of the ratio in three Supreme Court decisions

referred to herein. Therefore, the entire Muslim community cannot be branded as backward class of citizens.

Thirdly, when a legislation or executive action providing reservations is challenged before the Constitutional Court, primary scrutiny should be searching and strict scrutiny. Primary review is mainly concerned with the legislative competency of the legislation enacting the impugned law and question whether such legislation or executive action violating the fundamental rights under Article 14, 15 and 16 of Constitution of India. During such primary review, so as to satisfy the strict scrutiny test, it is for the State to demonstrate before the Court that the conditions precedent for exercising the power under Article 15(4) and 16(4) exist. The burden entirely lies on the State to prove and justify the legislation when such legislation *prima facie* is suspect of being unconstitutional. However, when the secondary review is taken up to examine the question of irrationality and arbitrariness in the provisions of the impugned legislation or executive action, the Court need to apply intermediate or deferential scrutiny by applying Wednesbury principle.

Fourthly, while determining social backwardness of a class of citizens, en expert body like B.C.Commission has to necessarily evolve absolutely relevant criteria for the purpose of caste test, occupation test and means test. Wherever social backwardness is due to a class of people being born in a homogenous endogamous group called caste with common traits and rigid customs and social rules, the caste test itself lead to an inference that the class/caste is socially backward. If the occupation of majority of a class of citizens is considered inferior and unremunerative, and such class of people is considered lowly placed in the society, it would ordinarily satisfy the test of social backwardness. The means test presupposes that by reason of birth in a class of people, historically and traditionally the entire class suffers from perennial poverty, in which case, the means test would enable the determination of social backwardness. The B.C.Commission did not evolve any criteria for identifying social backwardness and did not apply the three tests in a scientific and objective manner.

Fifthly, the B.C.Commission at the stage of collecting preliminary data, evolving criteria and conducting public hearings for the purpose of hearing objections from the public, did not take such steps which can be called transparent and fair. Though, the nature of enquiry by B.C.Commission cannot be strictly treated as quasi-judicial, but still while undertaking an exercise for identification of backward class of citizens, the Commission is legally bound to be fair and transparent and afford all such opportunity to objectors and proponents for

effective representation before the Commission. The prior non-publication of criteria and data collected by the B.C.Commission renders the report of the B.C.Commission illegal being contrary to provisions of B.C.Commission Act and principles of fairness.

Sixthly, the sample collected by the B.C.Commission is not representative of the population both with reference to general population and Muslim population. The sampling design is defective and imperfect. The analysis of the data by the B.C.Commission is faulty for more than one reason. So to say, the collection of the data, the analysis of the data and the conclusions drawn from the data are not scientific and B.C.Commission totally failed in considering the reference made to it in an objective manner after taking into consideration the entire population, as mandated by the nine-Judge Bench of the Supreme Court in **Indra Sawhney-I**.

Seventhly, the B.C.Commission laid over-emphasis on educational backwardness and economic backwardness of Muslim community in coming to the conclusion that Muslims are socially backward. This is contrary to the law laid down by the Supreme Court in **Balaji, Jayasree**, **Vasanth Kumar** and **Indra Sawhney-I**, to the effect that mere poverty, economic backwardness and educational backwardness are not indicative of social backwardness which is unignorable conditionality for operating Article 16(4) of the Constitution of India. To be branded as a socially backward, apart from poverty, economic backwardness and educational backwardness, there should be something more in a class of citizens for qualifying for the benefit of reservation. The B.C.Commission totally ignored this aspect of the matter and therefore its report cannot stand the scrutiny of this Court. The B.C.Commission and the impugned Ordinance which is entirely based on it is unconstitutional and *ultra vires* Articles 15(4) and 16(4) of the Constitution of India.

At Eighth, the impugned Ordinance is religion specific aimed at providing five per cent reservation to Muslim community. The preamble, the long title and Sections 3, 4 and 5 of the impugned Ordinance abundantly make it clear that it is a legislation intended to benefit a class of people who belong to Muslim community. Such legislation is violative of Article 15(1) and 16(2) of Constitution of India and therefore void.

At Ninth, the action of the State in making a single point reference to B.C.Commission, though number of claims for inclusion in the list of backward classes by other communities are pending, does not in any manner violate Article 14 of Constitution of India.

At Tenth, Sections 4 and 5 of Ordinance providing five percent reservation

for Muslim community in educational institutions and public employment would certainly result in the total reservation exceeding the strict rule of fifty per cent. As Section 3, which declares Muslim community as backward class does not survive and is *ultra vires*, the question of severing Sections 3 and 4 does not arise.

PART IX

EPILOGUE

Affirmative State Action as an equalizing principle has great democratic force. It ensures equality by slightly pushing up those who are far below the normative standards from the point of view of social, economic and political status and position. In resorting to such policy, the Government is presumed to be aware of the divisions in the society on the basis of religion, caste, culture and race. Though the Constitution abhors these as a consideration in formulation of structured policy, nevertheless the State cannot ignore these factors. It does not however mean that the State can ignore the very legal principles and Rule of Law, which justify consideration of such aspect and adopt a policy which has a tendency of resurrecting divisive social forces; the affirmative action is to minimize divisions and not to multiply them. The constitutional axioms that legislation is presumed to be constitutional and that the Legislature knows the needs, problems and demands of the citizens and has necessary wisdom to solve and provide for those, have to guide any constitutional adjudication. There is, however, no presumption that all Government actions, however, laudable, they result in dispensing maximum benefits to majority of the people with least deprivation to the non-beneficiaries of State action. Therefore, the Court has to look to the effect of the State action either through legislative route or otherwise. An eleven-Judge Bench of the Supreme Court in **R.C.Cooper v Union of India**[128] after referring to the earlier case law ruled that, "the theory that the object and form of the State action determine the extent of protection which an aggrieved party may claim is not consistent with the constitutional scheme". It was further observed:

> We have carefully considered the weighty pronouncements of the eminent Judges who gave shape to the concept that the extent of protection of important guarantees, such as the liberty of person, and right to property, depends upon the form and object of the State action, and not upon its direct operation upon the individual's freedom. But it is not the object of the authority making the law impairing the right of a citizen, nor the form of action taken that determines the protection he can claim: it is the effect of the law and of the action upon the right which attracts the jurisdiction of the Court to grant relief. If this be the true view and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual's rights.

We may observe that any and all State actions may be due to constitutional choices within the framework of Suprema Lex but the exercise of such choice must be subject to constitutional limitations including getting through the strict scrutiny test by judicial review. We are afraid the State failed in this case. In the whole exercise, leading to impugned Ordinance, we have a doubt whether State adhered to constitutional principle and constitutional Dharma. The benefit of doubt would

certainly go to the "equality" principle that is reflected in the entire Constitution of India. When a policy of affirmative action is subject of judicial review, the Court should apply strict scrutiny test while taking up primary review of the matter. But when the policy is tested on the ground of arbitrariness and reasonableness, secondary review should be intermediate scrutiny or deferential scrutiny, subject to the State complying with minimum rationality test.

Poverty, illiteracy, unemployment, undeserved want, inaccessibility to material resources and lack of equality of opportunity are prevalent in all religious communities, castes and groups. Constitution of India, therefore, envisages in Part-IV of the Constitution, the Directive Principles of State policy, which are fundamental in the Governance of the country requiring the State to strive to promote the welfare of the people so that they will be free from poverty, unemployment, sickness and right to an adequate means of livelihood. If a religious community or a religious group, call it caste, tribe or clan – is the perennial victim of these general afflictions in the society, the solution is not Article 15(4) and 16(4) of Constitution of India. It lies elsewhere. In finding a solution and implementing ameliorative provisions, the State and the Sovereign have to treat all the citizens equally to ensure Justice driven social order, or else in never ending inequality matrix, the State would become a tool of irrational division of the society.

We, after due and anxious consideration of the core issues as well as collateral issues, hold that impugned Ordinance is ultra vires, unconstitutional and violative of fundamental rights under Articles 14, 15(1), 15(4), 16(2) and 16(4) of Constitution of India. We, accordingly, declare A.P.Reservation of seats in the Educational Institutions and of appointments or posts in the Public Services under the State to Muslim Community Ordinance, 2005 (A.P.Ordinance No.13 of 2005) as unconstitutional and void, and allow all the writ petitions. We make no order as to costs.

Judgment: (Per N.V. Ramana, J.)

I have had the advantage of going through the judgments of my learned brothers Sri Justice Bilal Nazki, Acting Chief Justice, Justice Sri Goda Raghuram and Justice Sri V.V.S. Rao, and

I broadly concur with their conclusions that the Andhra Pradesh Reservation of Seats in Educational Institutions and of Appointments or Posts in Public Service under the State to Muslim Community Ordinance 2005 (Ordinance No. 13 of 2005), notified in A.P. Gazette No. 30, dated 21.06.2005, is *ultra vires* and in violation of the fundamental rights guaranteed under articles 14, 15(1), 15(4), 16(2) and 16(4) of the Constitution of India, and be, accordingly, struck down.

Since the issues that arise for consideration in these writ petitions are of considerable importance, I consider it necessary to briefly state my views on them. The main question is as to whether the Muslim community as a whole in Andhra Pradesh can be treated as a "backward class of citizens" for purposes of

articles 15(4) and 16(4) of the Constitution. While the petitioners would contend that the Muslim community as a whole in Andhra Pradesh is not a backward class, but the report of the A.P. Backward Classes Commission which forms the basis of the impugned Ordinance, has declared so. Articles 15(4) and 16(4) of the Constitution, enable the State to provide reservation in favour of "socially and educationally backward classes" and "any backward class of citizens" respectively. The circumstances under which a class of citizens can be treated as backward and the criteria to be adopted for identification of backwardness, are some of the issues which have been extensively debated before us. Reliance has invariably been placed by almost all the counsel, both for and against the Ordinance, on the judgment of the Supreme Court in **Indra Sawhney v. Union of India**[129], particularly the majority opinion of

Sri B.P. Jeevan Reddy, J.

The opinion of Jeevan Reddy, J., in **Indra Sawhney v. Union of India**, as to the criteria to be adopted for identification of "other backward classes", under article 16(4) was extensively referred to by a five-Judge Bench of this Court in **T. Muralidhar Rao v. State of A.P.**[130], and the criteria was also extended for identification of the "socially and educationally backward classes" under article 15(4). It is necessary, therefore, to refer to the opinion of Jeevan Reddy, J. Speaking for the majority, in **Indra Sawhney v. Union of India,** he stated at paras 782 and 783 (SCC - pages 716 and 717):

> Coming back to the question of identification, the fact remains that one has to begin somewhere – with some group, class or section. There is no set or recognized method. There is no law or other statutory instrument prescribing the methodology. The ultimate idea is to survey the entire populace. If so, one can well begin with castes, which represent explicit identifiable social classes/groupings, more particularly when Article 16(4) seeks to ameliorate social backwardness. What is unconstitutional with it, more so when caste, occupation, poverty and social backwardness are so closely intertwined in our society? Individual survey is out of question, since Article 16(4) speaks of class protection and not individual protection. This does not mean that one can wind up the process of identification with the castes. Besides castes (whether found among Hindus or others) there ay be other communities, groups, classes and denominations which may qualify as backward class of citizens. For example, in a particular State, Muslim community as a whole may be found socially backward. (As a matter of fact, they are so treated in the State of Karnataka as well as in the State of Kerala by their respective State Governments). Similarly, certain sections and denominations among Christians in Kerala who were included among backward communities notified in the former princely State of Travancore as far back as in 1935 may also be surveyed and so on and so forth. Any authority entrusted with the task of identifying backward classes may well start with the castes. It can take caste

'A', apply the criteria of backwardness evolved by it to that caste and determine whether it qualifies as a backward class or not. If it does qualify, what emerges is a backward class, for the purpose of clause (4) of Article 16. The concept of 'caste' in this behalf is not confined to castes among Hindus. It extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice. Having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes. For example, it may take up the Muslim community (after excluding those sections, castes and groups, if any, who have already been considered) and find out whether it can be characterized as a backward class in that State or region, as the case may be. The approach may differ from State to State since the conditions in each State may differ. Nay, even with a State, conditions may differ from region to region. Similarly, Christians may also be considered. If in a given place, like Kerala, there are several denominations, sections or divisions, each of these groups may separately be considered. In this manner, all the classes among the populace will be covered and that is the central idea. The effort should be to consider all the available groups, sections and classes of society in whichever order one proceeds. Since caste represents an existing, identifiable, social group spread over an overwhelming majority of the country's population, we say one may well begin with castes, if one so chooses, and then go to other groups, sections and classes. We may say, at this stage, that we broadly commend the approach and methodology adopted by Justice O. Chinnappa Reddy Commission in this respect.

We do not mean to suggest – we may reiterate – that the procedure indicated hereinabove is the only procedure or method/approach to be adopted. Indeed, there is no such thing as a standard or model procedure/approach. It is for the authority (appointed to identify) to adopt such approach and procedure as it thinks appropriate, and so long as the approach adopted by it is fair and adequate, the court has no say in the matter. The only object of the discussion in the preceding para is to emphasize that if a Commission/Authority begins its process of identification with castes (among Hindus) and occupational groupings among others, it cannot by that reason alone be said to be constitutionally or legally bad. We must also say that there is no rule of law that a test to be applied for identifying backward classes should be only one and/or uniform. In a vast country like India, it is simply not practicable. If the real object is to discover and locate backwardness, and if such backwardness is found in a caste, it can be treated as backward; if it is found in any other group, section or class, they too can be treated as backward.

While holding that the concept of caste was not confined merely to Hindu religion and that it extended, irrespective of religious sanction for such practice, to other religions also,

Jeevan Reddy, J., held that having exhausted the castes, the authority was entitled to take up for consideration occupational groups, communities and classes to determine as to whether they constitute "other backward classes" for the purpose of article 16(4) of the Constitution and, as an example, stated that the Muslim community, as a whole, could be taken into consideration for being categorized as

a backward class. The illustration, given by

Jeevan Reddy, J., cannot be read out of context to contend that Muslims, as a religious group, are a "backward class" of citizens.

In **T. Muralidhar Rao v. State of A.P.**, Sri. B. Sudershan Reddy, J., speaking for the majority, held at paras 97, 98 and 99 (page 41), thus:

> **97**. The expression "socially and educationally backward class of citizens" used in clause (4) of Article 15 and the expression "backward class of citizens" employed in clause (4) of Article 16 are not defined in the Constitution. The torturing question what does the expression "socially and educationally backward classes" in Article 15(4) and "backward class of citizens" in Article 16(4) signify and how should they be identified, engaged the attention of the Courts.
>
> **98**. The Courts have been grappling with the problem over the years. **M.R. Balaji v. State of Mysore** (supra) was a case arising under Article 15(4). The view expressed about Article 15(4) came to be accepted as equally good and valid for the purpose of Article 16(4) until the decision in **Indra Sawhney's** case (supra). The Supreme Court having examined the scheme of Article 15, the meaning of the expression 'socially and educationally backward class' the importance of caste in Hindu social structure observed:
>
> Therefore, in dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens… though the caste of the group of citizens may be relevant, its importance should not be exaggerated. If the classification of Backward Classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the caste themselves.
>
> … Besides, if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, that test would inevitably break down in relation to many sections of Indian society which do not recognize castes in the conventional sense known to Hindu society. How is one going to decide whether Muslims, Christians or Jains or even Lingayats are socially backward or not? The test of castes would be inapplicable to those groups, but that would hardly justify the exclusion of these groups in toto from the operation of Article 15(4). *It is not unlikely that in some States some Muslims or Christians or Jains forming groups may be socially backward. That is why we think that though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or the dominant test in that behalf. Social backwardness is on the ultimate analysis the result of poverty to a very large extent…* It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens" (emphasis is ours).
>
> **99**. Social stratification has a unique place in the politico-socio-economic analysis of Indian Society, which is considered to be the most stratified of all known civilized societies in human history. The caste system with its myriad form of super-ordination and subjugation, its many oppressive customs, is perhaps singularly responsible for conflicting this dubious distinction. The Indian society which is plural in its nature is so complex making it difficult to define what a

"Backward Class" is.

The learned Judge recognized the possibility of a group/section of Muslims, in some States, being socially backward, and summarized his conclusions, at para 249 (pages 71 and 72), as follows:

> 1(a) The expression "socially and educationally Backward Classes" in Article 15(4) and the expression "backward class of citizens" in Article 16(4) may include any caste, community or social group which may be identified as socially backward. That a caste is also a class of citizens and if such caste as a whole in its entirety is socially and educationally backward, provisions can be made in favour of such caste on the basis that it has socially and educationally backward class of citizens within the meaning of Article 15(4). The same can be treated as a backward class within the meaning of Article 16(4). Social backwardness may be found in other groups, classes and sections among the populace apart from the caste.
>
> 1(b) The Muslims as a group are entitled to affirmative action/social reservations within the constitutional dispensation, provided they are identified as Socially and Educationally Backward Class for the purposes of Article 15(4) and Backward Class of Citizens under Article 16(4). Providing social reservations to the Muslim Community or sections or groups amongst them in no manner militate against secularism, which is a part of basic structure of the Constitution.
>
> 2. The problem of determining who are socially Backward Classes is a very complex one. The caste which is a social class if found educationally and socially backward for the purposes of Article 15(4), it would be socially and educationally backward class. Similarly, if it is backward socially, it would be a backward class for the purposes of Article 16(4).
>
> The Backward Classes can be identified on the basis of a caste which is a social class in India provided it is identified to be socially and educationally backward for the purposes of Article 15(4) and backward for the purpose of Article 16(4). There are no legal or constitutional impediments for identification of the Backward Classes with reference to caste. However, the requirement is that a rational and scientific criteria must b evolved for determining backwardness and that criteria must be applied to find out whether any caste, occupational groups, classes or sections of people qualify for classifying them as Backward Classes. If the criteria evolved and applied for identification of the Backward Classes is found to be improper and invalid, then the classification of socially Backward Classes based on that criteria will have to be held to be inconsistent with the requirements of Articles 15(4) and 16(4).
>
> In case of non-Hindus social backwardness cannot be identified for the purposes of recognizing as socially backward class on the basis of caste in the conventional sense known to Hindu

Society. In all such cases, the part played by the occupation, conventional belief and place of habitation coupled with poverty may play a dominant and significant role in determining social backwardness. No particular procedure or method of identification of Backward Classes is prescribed. The authority appointed to identify the Backward Classes is free to adopt such method/procedure as it thinks fit and proper and so long, the method/procedure adopted for the purposes of identification of the Backward Classes is rational, scientific, fair and adequate, the same may satisfy the constitutional requirement. But in either case, identification of Backward Classes cannot be based exclusively and solely on the basis of caste.

Sri. J. Chelameswar, J., in his concurring opinion in **T. Muralidhar Rao v. State of A.P.**, held at paras 29, 30, 31 and 32 (pages 84 and 85), thus:

29. Again in Indra Sawhney's case (supra), the Supreme Court once again observed the possibility of the Muslim Community as a whole being found socially backward. At para (782), it is held as follows:

"… Besides castes (whether found among Hindus or others) there may be other communities, groups classes and denominations which may qualify as backward class of citizens. For example, in a particular State, Muslim Community as a whole may be found socially backward…"

30. In substance, the Supreme Court held that while in the case of identifying the Backward Classes of citizens among the Hindus, caste is a relevant factor, though not the only or dominant factor, the Court did not rule out the possibility of the identification of a class of citizens on the basis of various other factors like the occupation, religion etc. The Supreme Court observed in Indra Sawhney's case (supra):

"one has to begin somewhere… with some group, class or section".

31. It is only an identification tag and a preliminary step in the identification of a backward class of citizens.

"… Identification of the Backward Classes can certainly be done with reference to castes among, and along with, other occupational groups, classes and sections of people. One can start the process either with occupational groups or with castes or with some other groups. Thus one can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does – what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace…".

32. For the same reason, I do not find any legal infirmity in identifying a group or section of people by their profession or calling or the religion they follow. The next step is to examine whether such a class in its entirety answers the description of a backward class of citizens within the meaning of Articles 15(4) or 16(4). The initial step of identifying a section of the society on the basis of the religion they follow is only an identification of a class of citizens, but not identification of a backward class of citizens. In my view, such an exercise is perfectly justified and within the parameters of the law laid down by the Supreme Court in this regard. Therefore, the submission is required to be rejected.

Chelameswar, J., following the judgment of the Supreme Court in **Indra Sawhney v. Union of India**, did not rule out the possibility of identification of a class of citizens, on the basis of religion, as a backward class.

In **Indra Sawhney v. Union of India**, the Supreme Court merely took note of the theoretical possibility of Muslims, as a whole, in a State, falling under the category of "backward class" of citizens. These observations of the Supreme Court have been followed and summarized in **T. Muralidhar Rao v. State of A.P.** Speaking for the majority, Sudershan Reddy, J., emphasized this theoretical possibility, and held at para 110 (page 43):

> Therefore, sections/groups among muslim community or the muslim community itself could be identified as socially and educationally backward class for the purpose of Article 15(4) and as backward class of citizens for the purpose of Article 16(4) **provided they satisfy the test of social backwardness**.
>
> (emphasis supplied).

The very concept of "class" denotes a number of persons having certain common traits, which distinguish them from others. There does not appear to be any constitutional prohibition on taking the Muslim community as a whole in Andhra Pradesh for making the necessary inquiry under articles 15(4) and 16(4) of the Constitution. The question is not whether the Muslim community is a "class"; rather, the real question is whether it qualifies as a "backward class of citizens". The object of inquiry is to discover and locate social backwardness, and if such backwardness is found in the Muslim community as a whole in Andhra Pradesh, it can be treated as "backward". The connecting link is the social backwardness. For Muslims as a whole, in the State of Andhra Pradesh, to be treated as a socially backward class of citizens, the connecting link of social backwardness must run through the entire Muslim community in Andhra Pradesh, and not merely through a group or sect thereof. If this common thread of social backwardness is absent in the entire Muslim community and is found merely in a group or sect thereof, then such group or sect among Muslims, and not Muslims as a whole, would constitute a "socially backward" class of citizens, for reservations under articles 15(4) and 16(4) of the Constitution. The reports of the earlier Commissions (Anantaraman and Muralidhar Rao) have held that Muslims, as a class in Andhra Pradesh, are not socially and educationally backward and that, except for a few Muslims sects, all other sects among Muslims enjoy equal status. These Commissions had recommended a few classes among the Muslims like Dudekula and Mehtar for inclusion in the list of backward classes.

While the theoretical possibility of Muslims as a whole, in a State,

constituting a socially backward class of citizens, cannot be ruled out, it does not follow therefrom that religion, without anything more, can be the sole basis for determining a class of citizens as socially backward, as such religion-specific classification would fall foul of articles 15(2) and 16(2) of the Constitution.

The scope of judicial review in matters of reservations in favour of "socially and educationally backward" classes of citizens, under article 15(4) and "other backward classes" under article 16(4), has to be confined to an examination as to whether the report of the expert body and the material which formed the basis for such a report establish the connecting link of social backwardness with the caste/group/religious community, whose claim for providing reservation is under consideration. From the report of the Backward Classes Commission, which formed the basis of the impugned Ordinance, it cannot be said that this connecting link of social backwardness exists among Muslims as a whole in Andhra Pradesh.

The A.P. State Commission for Backward Classes is a statutory body constituted under the A.P. Backward Classes Commission Act, 1993 (Act 20 of 1993). The Commission was constituted in accordance with the directions of the Supreme Court in **Indra Sawhney v. Union of India**, wherein the desirability of a permanent body for examining complaints of over-inclusion or under-inclusion in the list of Backward Classes was indicated (Per Jeevan Reddy, J.), at para 117 (AIR - page 579), as follows:

> We are of the considered view that there ought to be a permanent body, in the nature of a Commission or Tribunal, to which complaints of wrong inclusion or non-inclusion of groups, classes, and sections in the lists of Other Backward Classes can be made. Such body must be empowered to examine complaints of the said nature and pass appropriate orders. Its advice/opinion should ordinarily be binding upon the Government. Where, however, the Government does not agree with its recommendations, it must record its reasons therefor. Even if any new class/group is proposed to be included among the other backward classes, such matter must also be referred to the said body in the first instance and action taken on the basis of its recommendation. The body must be composed of experts in the field, both official and non-official, and must be vested with the necessary powers to make a proper and effective enquiry. It is equally desirable that each State constitutes such a body, which step would go a long way in redressing genuine grievances. Such a body can be created under clause (4) of Art. 16 itself – or under art. 16(4) read with Article 340 – as a concomitant of the power to identify and specify backward class of citizens, in whose favour reservations are to be provided. We direct that such a body be constituted both at Central level and at the level of the States within four months from today. They should become immediately operational and be in a position to entertain and examine forthwith complaints and matters of the nature afore-mentioned, if any, received. It should be open to the Government of India and the respective State Governments to devise the procedure to be followed by such body. The body or bodies so created can also be consulted in the matter of periodic revision of lists

> of O.B.Cs. As suggested by Chandrachud, C.J. in Vasant Kumar (AIR 1985 SC 1495), there should be a periodic revision of these lists to exclude those who have ceased to be backward or for inclusion of new classes, as the case may be.

Section 3 of Act 20 of 1993 provides for constitution of a Commission, which is to consist of a sitting or retired Judge of a High Court or a retired Judge of the Supreme Court, as its Chairman, a Social Scientist, and two persons having special knowledge in matters relating to backward classes, as its members. Section 9 relates to the functions and powers of the Commission. The Commission is required to examine the request for inclusion of any class of citizens as a backward class in the list, hear complaints of over-inclusion or under-inclusion of any class in such list and tender such advice to the Government as it deems appropriate. The Commission is empowered to make recommendations in any other matter relating to backward classes that may be referred to it, by the Government, from time to time. Section 11 confers power on the Government to revise the list of backward classes periodically and exclude from such list those classes that ceased to be backward or to include in such list, new backward classes. Section 11(2) requires the Government, while undertaking revision of the list of backward classes, to consult the Commission.

Should this Court prescribe the criteria for determining whether Muslims, as a whole, in the State of A.P. constitute "backward" class of citizens? In the words of Jeevan Reddy, J., in **Indra Sawhney v. Union of India,** in para 55 (AIR - pages 537 and 538):

> … determination of backwardness is not a subjective exercise nor a matter of subjective satisfaction. As held herein – as also by the earlier judgments – the exercise is an objective one. Certain objective social and other criteria has to be satisfied before any group or class of citizens could be treated as backward. If the executive includes for collateral reasons, groups or classes not satisfying the relevant criteria, it would be a clear case of fraud on power…

Jeevan Reddy, J., held that there was no standard or model procedure for identification of backward classes, and it was for the authority, appointed to identify backwardness, to adopt such approach and procedure as it thought appropriate, and as long as the approach and procedure adopted by it was fair and adequate, the Court had no say in the matter. He also held that there is no rule of law that a test to be applied for identifying backwardness should be only one and/or uniform, and since the object of the authority is to discover and locate backwardness, if such backwardness is found in any group, section or class, they too could be treated as backward.

In **T. Muralidhar Rao v. State of A.P.**, Sudershan Reddy, J., at para 249(8)

(pages 73 and 74), held:

> The determination of backwardness and the process of identification is not a subjective exercise nor a matter of subjective satisfaction. The exercise is an objective one. The authority entrusted with the task of identification is required to evolve objective, social, sociological and other considerations and apply the same before any group or class of citizens could be treated as backward. That if the body entrusted with the task of identification or for that matter, the Executive includes, for collateral reasons any group or class not specifying the relevant criteria as a backward class, it would be a clear case of fraud on power. The decision is liable to be tested on the touchstone of arbitrariness, irrationality and as well as on the grounds of non-application of mind or perversity or on the ground that it was formed on collateral grounds. The norms and parameters for adjudging the validity of administrative action are applicable for testing the validity of exercise of power and in particular, the action taken under Articles 15(4) and 16(4) so far as the identification of Backward Classes is concerned, the yardstick is same and not different.
>
> However, formation of opinion regarding adequacy of representation in the services of the State is within the subjective satisfaction of the Government. The State is entitled to form its opinion on the basis of the material it has in its possession already or it may gather such material from a Commission/Committee, person or authority, but even that opinion formed is not beyond the judicial scrutiny altogether. In the absence of existence of circumstances and the material relevant to the formation of opinion for drawing requisite satisfaction, the decision is challengeable; the judicial scrutiny would be available on the ground of non-application of mind or formulation of collateral grounds. If the formation of opinion is found to be mala fide or is found to be based wholly on extraneous and/or irrelevant grounds, it is liable to be set aside.
>
> The words of Article 16(4) are not simplicitor, "in the opinion of the State" "is not adequately represented" in the services under the State, the State may make provision for the reservation of appointments or posts in favour of backward class of citizens. It is a conditional power and the same can be exercised provided the requisite factual situation which is a condition precedent to the exercise of power exists. Whether condition precedent to the formation of the opinion have a factual basis can always be examined by the Court. However, the sufficiency of the material, reasonableness and propriety cannot be gone into by this Court.

The objective criteria to be adopted, for determining social and educational backwardness, is for the Commission to decide and not for this Court to indicate or identify. As referred to above, the Commission, a permanent expert body, constituted in accordance with the directions of the Supreme Court in **Indra Sawhney v. Union of India**, under Act 20 of 1993, has been entrusted with the functions of identifying backward classes of citizens for inclusion in the list of backward classes. It is for the Commission to adopt a fair and objective approach to identify the backward classes of citizens, and not for this court to impose its views upon the Commission. This Court does not have expertise in such matters,

and must therefore, refrain from expressing its opinion or make observations which could be misconstrued as prescribing a procedure or indicating the criteria for identification of backward class of citizens.

While concurring with the opinion of Bilal Nazki, Acting Chief Justice, that it is not for this Court to suggest what should be the indicators for identifying backwardness, social or educational, among Muslims, I must express my reservations on the indicators given, by way of illustration, in the said opinion. The indicators suggested by Bilal Nazki, Acting Chief Justice, are the unfettered powers of Muslim men to divorce their wives, the effect of such power on the social and educational backwardness of the community, practice of "purdah" among a majority of Muslim women and its effect on their educational backwardness, high birth rate among Muslims, etc. The unfettered powers conferred on Muslim men to divorce their wives and the practise of "purdah" by Muslim women are practices based on Islam as a religion. Similar practices akin to "purdha" can be found in other religions, even amongst the "upper castes" Hindus, which castes cannot, by any reasoning, be held to be backward. The practice of "purdah" is prevalent among Rajput women (Kshatriyas), and it would be difficult to hold that Kshatriyas constitute a backward class of citizens. Religious practices such as the one, requiring Hindu widows to wear a white saree, remove her sindoor and mangal sutra on the death of her husband cannot, by any yardstick, be held to be indicators of backwardness. We find, among some sects of Brahmins, the practice of a woman tonsuring her head on the death of her husband. Sati and child marriages are practiced among a section of the Hindus. While these religious practices would be construed, by the intelligentsia, to be archaic and not in tune with modern society, they cannot be termed as rendering the practitioners, or the castes to which they belong, "backward classes".

Whether practices, based solely on religion, can be considered as indicators of backwardness, is not for this Court to prescribe. In exercising its powers of judicial review, this Court, in my humble opinion, should refrain from making observations which could well be construed as prescribing criteria for identification of the backward classes, which on a detailed debate or deliberation later, may be found to be erroneous.

To what extent can the reservations be made? Jeevan Reddy, J., speaking for the majority in **Indra Sawhney v. Union of India**, at para 94-A (AIR – page 566), held:

> It needs no emphasis to say that the principle aim of Articles 14 and 16 is equality and equality of opportunity and that clause (4) of Article 16 is but a means of achieving the very same objective. Clause (4) is a special provision – though not an exception to clause

(1). Both the provisions have to be harmonized keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article 14. The provision under Article 16(4) – conceived in the interest of certain sections of society – should be balanced against the guarantee of equality enshrined in clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society. It is relevant to point out that Dr. Ambedkar himself contemplated reservation being "confined to a minority of seats" (see his speech in Constituent Assembly, set out in para 28). No other member of the Constituent Assembly suggested otherwise. It is, thus, clear that reservation of a majority of seats was never envisaged by the founding fathers. Nor are we satisfied that the present context requires us to depart from that concept.

From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in clause (4) of Article 16 should not exceed 50%.

While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in farflung and remote areas the population inhabiting those areas might, on account of their being out of the main stream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

I concur with the opinion of Goda Raghuram, J. and V.V.S. Rao, J., that the total percentage of population of S.Cs., S.Ts. and B.Cs., in Andhra Pradesh exceeding 68% of the general population in the State, does not constitute an "extraordinary situation" enabling the State to provide reservations in excess of 50%.

The Commission, constituted under Act 20 of 1993, can effectively discharge the functions entrusted to it under the Act, only if it is provided with necessary infrastructure and the necessary assistance to make a detailed study of the social and educational backwardness of a class of citizens and thereafter make recommendations for inclusion of such class of citizens in the list of backward classes for being provided reservations under articles 15(4) and 16(4) of the Constitution. While the Commission was requested by the Government to study the socio-economic conditions of the Muslim minority community for their inclusion in the list of backward classes, and was therefore, required to conduct a detailed survey, the reason stated by the Commission for its failure to do so is indicated at page 52 of its report. To quote from the report:

> Similarly certain educational and social criteria adopted by the Mandal Commission require individual survey because of non-availability of this data through any governmental census. It is not possible to conduct this individual census by this Commission on any reasonable sample scale in the time frame mandated by the High Court. It is not practicable for this Commission to undertake this type of census in

any extended time frame also in view of the constraints of its resources and administrative machinery.

It needs no emphasis that reservations under articles 15(4) and 16(4) result in reduction in the number of seats available, in academic courses and posts in public services, on the basis of merit. There is every need, therefore, to ensure that only "the backward classes" and none else are extended the benefits of such reservation. This can only be ensured if a detailed survey is carried out to determine the backwardness of the entire class of citizens who seek inclusion in the list of backward classes. This detailed exercise is not only time consuming, but also requires extensive assistance of the administrative machinery, apart from adequate resources being placed at the disposal of the Commission. Failure to provide the necessary resources to the Commission, as has been highlighted by the Commission in its report, appears to have contributed to the adoption of irrelevant criteria for identifying social backwardness. However, the Commission cannot absolve itself of its responsibility as it was duty bound to have a proper investigation carried out to determine whether or not Muslims as a whole in Andhra Pradesh constitute a "backward" class of citizens. V.V.S. Rao, J., has made a detailed and thorough analysis of the report of the Commission, with which I concur. Since the flawed report of the Commission and its recommendations form the basis of the Ordinance, the Ordinance, has to be declared unconstitutional and void.

The writ petitions are accordingly allowed. No costs.

JUDGMENT OF THE COURT

(1) When the Court assembled today for pronouncement of the judgment, it was brought to our notice that the impugned Ordinance viz., Andhra Pradesh Reservation of seats in the Educational Institutions and of appointments/posts in the Public Services under the State to Muslim Community Ordinance, 2005 (Ordinance No.13 of 2005, dated 20.06.2005) has been repealed by A.P.Act No.21 of 2005, dated 25.10.2005. The learned counsel for the parties including the Advocate-General, submitted that there is no material change between the provisions of the Ordinance and the Act and a fresh hearing is not required. We have already allowed the amendments in the writ petitions. Therefore, in this judgment and the opinions, wherever the expression 'Ordinance No.13 of 2005, dated 20.06.2005' appear,

would mean 'Act No.21 of 2005, dated 25.10.2005'.

(2) Andhra Pradesh Reservation of seats in the Educational Institutions and of appointments/posts in the Public Services under the State to Muslim Community Act, 2005 (A.P.Act No.21 of 2005, dated 25.10.2005) is declared unconstitutional and violative of Articles 15 (4) and 16 (4) of the Constitution of India.

(3) There is no prohibition to declare Muslims, as a community, socially and educationally backward for the purposes of Articles 15 (4) and 16 (4) of the Constitution of India, provided they satisfy the test of social backwardness, as stated in the Judgment.

07-11-2005

When the judgment was pronounced, the learned Advocate-General sought leave to file an appeal before Supreme Court. Since substantial questions of public importance are involved, leave is granted. As far as admissions made in professional colleges are concerned, status quo as existing today, shall be maintained for a period of four weeks from today.

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(BILAL NAZKI, ACJ)

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(GODA RAGHURAM, J)

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(V.V.S.RAO, J)

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(N.V.RAMANA, J)

07-11-2005.

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(R.SUBHASH REDDY,J)

N.B:

(1) L.R.Copy to be marked.
(2) C.C. in two days.

(B/o)

AJR/ PVSN/*TSNR/PLN/

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[1] 1995 (2) ALD 147

[2] 2004 (6) ALD 1 (LB)

[3] AIR 1963 SC 649

[4] 1992 Supp (3) SCC 217

[5] (2000) 1 SCC 168

[6] 2004(5) ALT 634

[7] 1992 SUPP(3) SCC 217

[8] AIR 1951 SC 229

[9] AIR 1951 SC 226

[*] – 1. History of Eastern Christianity – A.S. Atiyah;
2. The Ancient Coptic Churches of Egypt – A.G. Butler;
3. The early Church – H. Chadwick;
4. The History of the Church from Christ to Constantine – Eusebius – Translated by G.A. Williamson;
5. A History of the Church – B.J. Kidd;
6. Profile in belief – A.C. Peipkorn;
7. Secrets of the Dead Sea Scrolls – H.J. Schonfield.

[10] (1972) 1 SCC 660

[11] AIR 1963 SC 649

[12] AIR 1968 SC 1012

[13] AIR 1969 SC 1

[14] 1972 (1) SCC 660

[15] (1971) 1 SCC 38

[16] (1985) (supp) SCC 714

[17] AIR 1964 SC 1823

[18] 266 US 507 (1925)

[19] (1973) 1 SCC 420

[20] (1975) 1 SCC 267

[21] AIR 1987 A.P 53

[22] AIR 1976 SC 1011

[23] .123.S.Ct.325(2003)

[24] 515.US 220

[25] *416 US 312 (1974)*

[26] 497 US 547 (1990)

[27] AIR 1968 SC 1379

[28] 'Schiller': Quoted by Prof.Upendra Baxi in his Foreword to 'Dalits betrayed' by Dr.B.D.Sharma.

[29] Nature of Judicial Process : First Indian Reprint 1995. pp.140-141

[30] (2003) 6 SCC 697 (See opinion of S.B.Sinha,J) paras 118-119 = AIR 2003 SC 3724

[31] 1992 Supp (3) SCC 217 = AIR 1993 SC 477

[32] (1966) 1 An.W.R. 294

[33] AIR 1963 SC 649

[34] AIR 1968 AP 165

[35] AIR 1968 SC 1379

[36] (1972) 1 SCC 660 = AIR 1972 SC 1375

[37] 1971 A.P.High Court Notes 210

[38] The effort of the Commission in collecting such enormous data – primary and secondary; can be found in Chapter I and other relevant Annexures of Muralidhara Rao Report.

[39] **Article 340: Appointment of a Commission to investigate the conditions of backward classes.-** (1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

[40] AIR 1987 AP 53 (FB)

[41] AIR 1995 AP 248 (FB)

[42] 2004 (6) ALD 1 (LB)

[43] **Amendment V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[44] See 'Law and Society in India', by Mark Galanter: Oxford India paper Book; 1992; p. 186.

[45] AIR 1951 SC 226

[46] AIR 1964 SC 179

[47] AIR 1964 SC 1823

[48] AIR 1969 SC 1 = (1969) 1 SCR 103

[49] (1973) 1 SCC 420 = AIR 1973 SC 980

[50] (1975) 1 SCC 267 = AIR 1975 SC 563

[51] (1976) 2 SCC 310 = AIR 1976 SC 490

[52] (1976) 3 SCC 730 = AIR 1976 SC 2381

[53] (1985) Supp. SCC 714 = AIR 1985 SC 1495

[54] (1994) 4 SCC 401

[55] (2000) 1 SCC 168 = AIR 2000 SC 498

[56] (1974) 40 L Ed 2d. 164

[57] (1990) 111 L Ed 445 = 497 US 547

[58] 515 US 220 = (1995) 132 L Ed 2d 158

[59] (1980) 448 US 448 = 65 l Ed 2d 902

[60] 534 US 103 = (2001) 151 L Ed 2d 489

[61] 539 US 306 (2003)

[62] Unreported Judgment dated 23.06.2003
(This was cited in **Islamic Academy** – para 115)

[63] Unreported Judgment dated 23.02.2005

[64] 488 US 469

[65] AIR 1952 SC 75

[66] AIR 1955 SC 191

[67] AIR 1958 SC 538

[68] (2001) 7 SCC 708 = AIR 2001 SC 3616

[69] AIR 1967 SC 1427

[70] (1974) 4 SCC 3 = AIR 1974 SC 555

[71] (1978) 1 SCC 248 = AIR 1978 SC 597

[72] (1991) 1 SCC 212 = AIR 1991 SC 536

[73] AIR 1993 SC 935

[74] (1983) 1 SCC 147 = AIR 1983 SC 239

[75] (1984) 3 All ER 935 = (1984) 3 WLR 1174 = 1985 AC 374

[76] (1994) 6 SCC 651 = AIR 1996 SC 11

[77] (1996) 3 SCC 709 = AIR 1996 SC 1627

[78] (1994) 3 SCC 1 = AIR 1994 SC 1918

[79] Wade & Philips : Constitutional Law and Administrative Law: 9th Edn., p.5.

[80] (1993) Supp 1 SCC 96 = AIR 1992 SC 522

[81] (1983) 1 SCC 305 = AIR 1983 SC 130 para 16

[82] AIR 1954 SC 728

[83] (1969(2 SCC 248 = AIR 1970 SC 129

[84] (1983) 2 SCC 277 = AIR 1983 SC 473

[85] 1991 (1) AC 696 = 1991 (1) All ER 720

[86] (2001) 2 SCC 386 = AIR 2000 SC 3689

[87] (2004) 4 SCC 714 = AIR 2004 SC 3800

[88] 94 US 113 = 24 L Ed 77 (1876)

[89] (1982) 3 All ER 141 = (1982) 1 WLR 1155 (HL)

[90] (1997) 7 SCC 209

[91] (1991) 3 SCC 91

[92] (1985) 1 SCC 641 = AIR 1986 SC 515

[93] (1985) 1 SCC 641

[94] (1993) 2 SCC 299 = AIR 1993 SC 1435

[95] AIR 1951 SC 229

[96] Constituent Assembly Debates; Vol.VII, pp 692-693.

[97] Constitutional Assembly Debates; Vol.VII. pp.701-702

[98] Employment and Unemployment Situation among Religious Groups in India 1999-2000, NSS 55th Round – National Sample Survey Organisation (NSSO), Ministry of Statistics and Programme Implementation, Government of India.

[99] These particulars are mentioned in the counter affidavit of B.C.Commission.

[100] (1990) 2 SCC 746 = AIR 1990 SC 1402

[101] (1995) 1 SCC 428

[102] 1998 (3) ALT 244 = 1998 (2) ALD 739

[103] (1983) 2 AC 570 (CA)

[104] (2002) 2 SCC 333 = AIR 2002 SC 350

[105] As per Section 2(d) “lists” means lists prepared by the Government from time to time for the purposes of making provision for the reservation of appointments of posts in favour of the backward classes of citizens which in the opinion of Government are not adequately represented in the services under the Government and in any local authority or other authority in the State.

[106] 1987 (1) ALT 665 (FB) para 76(b)

[107] ‘Educatives Statistics ‘2004-2005’ (Annual publication of Directorate of School Education)

[108] Chava Frankfort – Nachmias and David Nachmias; ‘Research Methods in the Social Sciences’ 5th ed. (London: Arnold of Hoddr Headline Group, 96), pp 183-185.

[109] This is annual exercise undertaken by the statistical wing of Directorate of School Education for the year 2004-05 on important aspects of educational indicators, published by the Directorate of School Education, Hyderabad.

[110] (1973) 4 SCC 225 = AIR 1973 SC 1431

[111] AIR 1955 SC 271

[112] AIR 1967 SC 1353

[113] AIR 1957 SC 164

[114] AIR 1963 SC 779

[115] AIR 1971 SC 1537

[116] See para 782-**Indra Sawhney-I:** Supreme Court indicated that “the concept of caste is not confined to

Hindus and that it extends to castes wherever they obtained irrespective of religious sanction". Also see paras 474 to 478 in the opinion of Sawant,J and para 25 in **Vasanth Kumar** of AIR.

[117] The term 'lists' is defined in Section 2(d) of A.P.Commission for Backward Classes Act, 1993. It reads: "lists" means lists prepared by the Government from time to time for the purposes of making provision for the reservation of appointments of posts in favour of the backward classes of citizens which, in the opinion of the Government, are not adequately represented in the services under the Government and in any local authority or other authority in the State;

[118] AIR 1960 SC 1208

[119] AIR 1969 SC 1 (para 4)

[120] 1994 Supp (1) SCC 324 = AIR 1993 SC 1804

[121] Article 325: **No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex.-** There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.

[122] AIR 1958 SC 538

[123] AIR 1979 SC 478

[124] AIR 1955 SC 166

[125] 'De minimis' means "the Law does not care for or take notice of very small or triffling matters". (see Black's Law Dictionary; 1990 edn. p431)

[126] (2004) 11 SCC 1 = AIR 2004 SC 2615

[127] (1984) 1 SCC 224 = AIR 1984 SC 121

[128] (1970) 1 SCC 248 = AIR 1970 SC 564

[129] 1992 Supp. (3) SCC 210 = AIR 1993 SC 477

[130] 2004 (6) ALD 1